COURT DECISIONS

FEDERAL TRADE COMMISSION

VOLUME XII
January 1, 1978 to December 31, 1978

Compiled by the Editorial/Publishing Services
Branch of the Office of the Secretary

UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON: 1980

For sale by the Superintendent of Documents, U.S. Government Printing Office
Washington, D.C. 20402

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PREFACE

COURT DECISIONS–FEDERAL TRADE COMMISSION (1978) is the twelfth volume of a series of publications setting forth the text of the majority of cases instituted against or by the Federal Trade Commission in the Federal courts.

This edition contains a cumulative table of cases beginning with 1976. The table of cases from 1914 through 1975 can be found in Volume IX of Statutes and Court Decisions.

The bracketed, boldface figures in the the text of cases reported by the National Reporter series and the Supreme Court cases reflect the page numbers of the official reporters.

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*Abbreviated as follows:

CRA ..... Civil Rights Act
CA ..... Clayton Act
EEOA ..... Equal Employment Opportunity Act
FTCA ..... Federal Trade Commission Act
FOIA ..... Freedom of Information Act
WPLA ..... Wool Products Labeling Act

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(D.C. N.J. 1976)	Not reported	11 C.D. 5.
Amolsch & Madden, Inc., d/b/a F.T.C.: Watch *v.* F.T.C., et al.		
(D.C. D.C. 1978)	Not reported	12 C.D. 161.
(D.C. Cir. 1978)	591 F.2d 809	12 C.D. 369.
Amrep Corp., et al.; U.S. *v.*		
(D.C. S.D.N.Y. 1976)	405 F.Supp. 1053	10 C.D. 26.
Amrep Corp., et al.; U.S. *v.*		
(D.C. S.D.N.Y. 1977)	Not reported	11 C.D. 645.
(D.C. S.D.N.Y. 1977)	Not reported	11 C.D. 737.
Amway Corp. *v.* F.T.C.		
(D.C. D.C. 1976)	Not reported	10 C.D. 186.

Name of Case	Reference	Reported in—
Anaconda Co., and Atlantic Richfield Co.; F.T.C. *v.* (D.C. E.D. Va. 1976)	Not reported	10 C.D. 507.
Anaconda Co., The, et al.; F.T.C. *v.* (4th Cir. 1977)	549 F.2d 289	11 C.D. 11.
Anderson, Raymond A. *v.* F.T.C., et al. (D.C. N.D. Ill. 1978)	Not reported	12 C.D. 5.
Anderson, Robert O., et al.; F.T.C. *v.* (D.C. D.C. 1977)	442 F.Supp. 1118	11 C.D. 713.
Anderson, Robert O., et al.; F.T.C. *v.* (D.C. D.C. 1978)	Not reported	12 C.D. 1.
A.O. Smith Corporation, et al. *v.* F.T.C., et al. (3d Cir. 1976)	530 F.2d 515	10 C.D. 101.
A.O. Smith, et al. *v.* F.T.C., et al. (D.C. Del. 1976)	417 F.Supp. 1068	10 C.D. 271.
A & R Agency, Inc., et al.; U.S. *v.* (D.C. N.D. Ill. 1976)	Not reported	10 C.D. 377.
ARA Services, Inc.; U.S. *v.* (D.C. Mo. 1978)	Not reported	12 C.D. 269.
(D.C. Mo. 1978)	Not reported	12 C.D. 273.
Arthur H. Courshon, et al. *v.* F.T.C., et al. (D.C. D.C. 1977)	435 F.Supp. 24	11 C.D. 73.
Ascot Oils, Inc.; U.S. *v.* (D.C. N.D. Tex. 1978)	Not reported	12 C.D. 504.
Ash Grove Cement Company *v.* F.T.C. (9th Cir. 1978)	577 F.2d 1368	12 C.D. 83.
Cert. denied (1978)	439 U.S. 982	
Ashland Oil, Inc. *v.* F.T.C., et al. (D.C. D.C. 1976)	409 F.Supp. 297	10 C.D. 83.
(D.C. Cir. 1976)	548 F.2d 977	10 C.D. 471.
Association Warehouse Foods, Inc.; F.T.C. *v.* (D.C. W.D. Mo. 1976)	Not reported	10 C.D. 545.
Association of National Advertisers, Inc. *v.* F.T.C., et al. (D.C. D.C. 1976)	Not reported	10 C.D. 220.
(D.C. D.C. 1976)	Not reported	10 C.D. 371.
(D.C. D.C. 1976)	Not reported	10 C.D. 424.
Association of National Advertisers, Inc. *v.* F.T.C. (2d Cir. 1977)	565 F.2d 237	11 C.D. 661.
Association of National Advertisers, Inc., et al. *v.* F.T.C., et al. (D.C. D.C. 1978)	460 F.Supp. 996	12 C.D. 393.
(D.C. D.C. 1978)	Not reported	12 C.D. 495.

Name of Case	Reference	Reported in—
Atida H. Karr, et al.; F.T.C. *v.*		
(D.C. D.C. 1978)	Not reported	12 C.D. 19.
Atlantic Richfield Co. and The Anaconda Co.; F.T.C. *v.*		
(D.C. E.D. Va. 1976)	Not reported	10 C.D. 507.
Atlantic Richfield Company *v.* F.T.C., et al.		
(5th Cir. 1977)	546 F.2d 646	11 C.D. 81.
Atlantic Richfield Co., et al.; F.T.C. *v.*		
(4th Cir. 1977)	549 F.2d 289	11 C.D. 11.
(D.C. Cir. 1977)	567 F.2d 96	11 C.D. 549.
Atlantic Richfield Company, et al. *v.* F.T.C., et al.		
(3d Cir. 1978)	588 F.2d 895	12 C.D. 481.
Auslander, Maxwell; U.S. *v.*		
(D.C. Md. 1978)	Not reported	12 C.D. 501.
A.W. Clausen, et al.; F.T.C. *v.*		
(D.C. S.D.N.Y. 1978)	Not reported	12 C.D. 151.
Bachman, Donald L., et al. *v.* Michael Pertschuk		
(D.C. D.C. 1977)	437 F.Supp. 973	11 C.D. 637.
Bachman, Donald L., et al. *v.* Michael Pertschuk		
(D.C. D.C. 1978)	Not reported	12 C.D. 45.
BankAmerica Corporation, et al.; F.T.C. *v.*		
(D.C. S.D.N.Y. 1977)	441 F.Supp. 234	11 C.D. 679.
BankAmerica Corp., et al.; F.T.C. *v.*		
(D.C. S.D.N.Y. 1978)	Not reported	12 C.D. 151.
Bankers Life and Casualty Co. and John D. MacArthur; F.T.C. *v.*		
(7th Cir. 1976)	532 F.2d 1135	10 C.D. 208.
Batten, Barton, Durstine & Osborne, Inc., et al. *v.* F.T.C.		
(9th Cir. 1978)	577 F.2d 653	12 C.D. 161.
Beatrice Foods Company *v.* F.T.C.		
(7th Cir. 1976)	540 F.2d 303	10 C.D. 408.
Beatrice Foods Co., et al.; F.T.C. *v.*		
(D.C. D.C. 1978)	Not reported	12 C.D. 229.
(D.C. Cir. 1978)	587 F.2d 1225	12 C.D. 277.
Beneficial Corporation, et al. *v.* F.T.C.		
(3d Cir. 1976)	542 F.2d 611	10 C.D. 454.
Cert. denied (1977)	430 U.S. 983	
Bestline Products Corporation, et al.; U.S. *v.*		
(D.C. N.D. Cal. 1976)	412 F.Supp. 754	10 C.D. 223.
(D.C. N.D. Cal. 1976)	Not reported	10 C.D. 565.
Bexar County Medical Society, et al.; F.T.C. *v.*		
(D.C. D.C. 1977)	431 F.Supp. 558	11 C.D. 175.
(D.C. D.C. 1977)	431 F.Supp. 561	11 C.D. 191.

Name of Case	Reference	Reported in—
Blue Ribbon Quality Meats, Inc., and James Flanary; F.T.C. *v.* (D.C. W.D. Mo. 1976)	434 F.Supp. 159	10 C.D. 447.
Blue Ribbon Quality Meats, Inc., et al. *v.* F.T.C., et al. (8th Cir. 1977)	560 F.2d 874	11 C.D. 531.
BOC International Ltd., et al. *v.* F.T.C. (7th Cir. 1977)	557 F.2d 24	11 C.D. 429.
Boice, Kathie, et al.; F.T.C. *v.* (D.C. D.C. 1978)	Not reported	12 C.D. 99.
Book-of-the-Month Club, Inc.; U.S. *v.* (D.C. S.D. N.Y. 1978)	Not reported	12 C.D. 502.
Bridgestone Tire Company of America, Inc.; U.S. *v.* (D.C. C.D. Cal.1978)	Not reported	12 C.D. 501.
Bristol-Myers Co. *v.* F.T.C. (D.C. D.C. 1976)	Not reported	10 C.D. 559.
Bristol-Myers Co. *v.* F.T.C., et al. (D.C. S.D. N.Y. 1976)	Not reported	10 C.D. 563.
Bristol-Myers Co. *v.* F.T.C., et al. (D.C. D.C. 1978)	Not reported	12 C.D. 297.
(D.C. Cir. 1978)	598 F.2d 18	12 C.D. 243.
British Oxygen Company, Ltd.; F.T.C. *v.* (3d Cir. 1976)	529 F.2d 196	10 C.D. 40.
British Oxygen Company, Ltd., et al.; F.T.C. *v.* (D.C. Del. 1977)	437 F.Supp. 79	11 C.D. 587.
Brown & Williamson Tobacco Corp., et al.; U.S. *v.* (D.C. S.D. N.Y. 1978)	Not reported	12 C.D. 39.
Browning Arms Company; U.S. *v.* (D.C. Utah 1976)	Not reported	10 C.D. 566.
California Dental Association, et al.; F.T.C. *v.* (D.C. D.C. 1978)	Not reported	12 C.D. 99.
California Milk Producers Advisory Board, et al. *v.* F.T.C., et al. (9th Cir. 1977)	549 F.2d 1321	11 C.D. 151.
Cert. denied (1977)	434 U.S. 876	
California, State of, ex rel. C.B. Christensen, Director of Food and Agriculture *v.* F.T.C., et al. (9th Cir. 1977)	549 F.2d 1321	11 C.D. 151.
Cert. denied (1977)	434 U.S. 876	
Canyon House, Inc., et al.; U.S. *v.* (D.C. D.C. 1978)	Not reported	12 C.D. 503.
Carl E. Hartnack, et al.; F.T.C. *v.* (D.C. D.C. 1976)	Not reported	10 C.D. 543.

Name of Case	Reference	Reported in—
Carter, Donald P., et al.; F.T.C. *v.* (D.C. D.C. 1977)	Not reported	11 C.D. 729.
Casey, Sid, et al. *v.* F.T.C. (D.C. W.D. Wash. 1977)	Not reported	11 C.D. 457.
Casey, Sid, et al. *v.* F.T.C. Casey, Sid, et al.; F.T.C. *v.* (9th Cir. 1978)	578 F.2d 793	12 C.D. 115.
Charles R. Johnson; U.S. *v.* (D.C. E.D. Md. 1976)	Not reported	10 C.D. 565.
(8th Cir. 1976)	541 F.2d 710	10 C.D. 435.
Charlton, Francis J. *v.* F.T.C. (D.C. Cir. 1976)	543 F.2d 903	10 C.D. 179.
Chase Manhattan Bank, et al., The, *v.* F.T.C., et al. (2d Cir. 1976)	538 F.2d 937	10 C.D. 349.
Chase Manhattan Bank; F.T.C. *v.* (D.C. S.D. N.Y. 1977)	441 F.Supp. 234	11 C.D. 679.
Chase Manhattan Corp., et al.,The; F.T.C. *v.* (D.C. S.D. N.Y. 1978)	Not reported	12 C.D. 151.
Checker Motors Corporation and David R. Markin; F.T.C. *v.* (6th Cir. 1976)	532 F.2d 541	10 C.D. 174.
Checker Taxi Company, Inc. and Jerry E. Feldman; F.T.C. *v.* (7th Cir. 1976)	432 F.2d 1092	10 C.D. 126.
Chemetron Corporation, et al.; F.T.C. *v.* (D.C. N.D. Ill. 1978)	459 F.Supp. 785	12 C.D. 357.
Chemical New York Corporation, et al.; F.T.C. *v.* (D.C. S.D. N.Y. 1977)	441 F.Supp. 234	11 C.D. 679.
Chemical New York Corporation, et al.; F.T.C. *v.* (D.C. S.D. N.Y. 1978)	Not reported	12 C.D. 151.
Chocolate Manufacturers Association *v.* F.T.C., et al. (D.C. D.C. 1978)	Not reported	12 C.D. 499.
Chrysler Corporation *v.* F.T.C. (D.C. Cir. 1977)	561 F.2d 357	11 C.D. 497.
Citicorp., et al.; F.T.C. *v.* (D.C. S.D. N.Y. 1977)	441 F.Supp. 234	11 C.D. 679.
Citicorp., et al.; F.T.C. *v.* (D.C. S.D. N.Y. 1978)	Not reported	12 C.D. 151.
City Sewing Machine Company, Inc., The; U.S. *v.* (D.C. Kans. 1978)	Not reported	12 C.D. 503.
Clausen, A.W., et al.; F.T.C. *v.* (D.C. S.D. N.Y. 1977)	441 F.Supp. 234	11 C.D. 679.
Clausen, A.W., et al.; F.T.C. *v.* (D.C. S.D. N.Y. 1978)	Not reported	12 C.D. 151.

Name of Case	Reference	Reported in—
Cockrell, Sid, et al.; F.T.C. *v.*		
(D.C. D.C. 1977)	431 F.Supp. 558	11 C.D. 175.
(D.C. D.C. 1977)	431 F.Supp. 561	11 C.D. 191.
Continental Illinois Corporation, et al.; F.T.C. *v.*		
(D.C. S.D. N.Y. 1977)	441 F.Supp. 234	11 C.D. 679.
Continental Illinois Corporation, et al.; F.T.C. *v.*		
(D.C. S.D. N.Y. 1978)	Not reported	12 C.D. 151.
Corporate Patterns Report Litigation		
(D.C. D.C. 1977)	432 F.Supp. 274	11 C.D. 39.
(D.C. D.C. 1977)	432 F.Supp. 291	11 C.D. 201.
(D.C. D.C. 1977)	Not reported	11 C.D. 509.
(D.C. D.C. 1977)	Not reported	11 C.D. 573.
Corporate Patterns Report Litigation		
(D.C. Cir. 1978)	595 F.2d 685	12 C.D. 181.
Cert. denied (1978)	439 U.S. 958	
Corporate Patterns Report Litigation		
(D.C. Cir. 1978)	Not reported	12 C.D. 303.
Courshon, Arthur H., et al. *v.* F.T.C., et al.		
(D.C. D.C. 1977)	435 F.Supp. 24	11 C.D. 73.
Daniel Firestone; F.T.C. *v.*		
(D.C. N.D. Ohio 1976)	Not reported	10 C.D. 316.
David R. Markin and Checker Motors Corporation; F.T.C. *v.*		
(6th Cir. 1976)	532 F.2d 541	10 C.D. 174.
David Rockefeller, et al.; F.T.C. *v.*		
(D.C. S.D. N.Y. 1977)	441 F.Supp. 234	11 C.D. 679.
David Rockefeller, et al.; F.T.C. *v.*		
(D.C. S.D. N.Y. 1978)	Not reported	12 C.D. 151.
Disco Oil Company; U.S. *v.*		
(D.C. N.D. Ill. 1978)	Not reported	12 C.D. 503.
Dobbs, Inc.; U.S. *v.*		
(D.C. E.D. Mich. 1978)	Not reported	12 C.D. 503.
Donald L. Bachman, et al. *v.* Michael Pertschuk		
(D.C. D.C. 1977)	437 F.Supp. 973	11 C.D. 637.
Donald L. Bachman, et al. *v.* Michael Pertschuk		
(D.C. D.C. 1978)	Not reported	12 C.D. 45.
Donald P. Carter, et al.; F.T.C. *v.*		
(D.C. D.C. 1977)	Not reported	11 C.D. 729.
Donnelley Corp., The Reuben H. *v.* F.T.C., et al.		
(D.C. N.D. Ill. 1977)	Not reported	11 C.D. 651.
(D.C. N.D. Ill. 1977)	Not reported	11 C.D. 733.

Name of Case	Reference	Reported in—
Donnelley Corp., Reuben H. *v.* F.T.C. (7th Cir. 1978)	580 F.2d 264	12 C.D. 231.
Dresser Industries, Inc.; F.T.C. *v.* (D.C. D.C. 1977)	Not reported	11 C.D. 419.
Eli Lilly and Company *v.* F.T.C. (D.C. S.D. Ind. 1977)	Not reported	11 C.D. 187.
Ernstthal, Henry L., et al.; F.T.C. *v.* (D.C. D.C. 1978)	Not reported	12 C.D. 99.
Exxon Corporation, et al. *v.* F.T.C., et al. (D.C. Del. 1976)	411 F.Supp. 1362	10 C.D. 46.
Exxon Corporation *v.* F.T.C., et al. (D.C. D.C. 1977)	Not reported	11 C.D. 189.
(D.C. Cir. 1977)	Not reported	11 C.D. 427.
Exxon Corporation, et al.; F.T.C. *v.* (D.C. Cir. 1977)	555 F.2d 862	11 C.D. 253.
Cert denied (1977)	431 U.S. 974	
Exxon Corp., et al. *v.* F.T.C., et al. (D.C. Del. 1977)	436 F.Supp. 1012	11 C.D. 241.
(D.C. Del. 1977)	436 F.Supp. 1019	11 C.D. 575.
Exxon Corporation *v.* F.T.C., et al. (D.C. D.C. 1978)	466 F.Supp. 1088	12 C.D. 423.
(D.C. Cir. 1978)	589 F.2d 582	12 C.D. 339.
(3d Cir. 1978)	588 F.2d. 895	12 C.D. 481.
Faltico, Patrick R.; U.S. *v.* (8th Cir. 1978)	586 F.2d 1267	12 C.D. 405.
Fedders Corp. *v.* F.T.C. (2d Cir. 1976)	529 F.2d 1398	10 C.D. 32.
Cert. denied (1976)	429 U.S. 818	
Federal Paper Board Co., Inc.; F.T.C. *v.* (D.C. S.D. N.Y. 1977)	434 F.Supp. 1088	11 C.D. 535.
Federated Dairy Farms, Inc., et al.; F.T.C. *v.* (D.C. N.D. Cal. 1977)	432 F.Supp. 31	11 C.D. 65.
(D.C. Utah 1977)	Not reported	11 C.D. 595.
Federated Department Stores; U.S. *v.* (D.C. S.D. Ohio 1978)	Not reported	12 C.D. 503.
Feldman, Jerry E., and Checker Taxi Company, Inc.; F.T.C. *v.* (7th Cir. 1976)	532 F.2d 1092	10 C.D. 126.
Firestone, Daniel; F.T.C. *v.* (D.C. N.D. Ohio 1976)	Not reported	10 C.D. 316.
Firestone Tire & Rubber Company; U.S. *v.* (D.C. N.D. Ohio 1976)	Not reported	10 C.D. 565.
First National City Bank, et al. *v.* F.T.C., et al. (2d Cir. 1976)	538 F.2d 937	10 C.D. 349.

Name of Case	Reference	Reported in—
Food Town Stores, Inc., et al.; F.T.C. *v.*		
(4th Cir. 1976)	539 F.2d 1339	10 C.D. 395.
Food Town Stores, Inc., et al.; F.T.C. *v.*		
(4th Cir. 1977)	547 F.2d 247	11 C.D. 7.
Ford Motor Company *v.* F.T.C.		
(6th Cir. 1976)	547 F.2d 954	10 C.D. 327.
Cert. denied (1977)	431 U.S. 915	
Four States Builders and Remodelers, Inc.; U.S. *v.*		
(D.C. N.J. 1978)	Not reported	12 C.D. 501.
Francis Ford, Inc. *v.* F.T.C., et al.		
(D.C. Oreg. 1978)	Not reported	12 C.D. 320.
Francis J. Charlton *v.* F.T.C.		
(D.C. D.C. 1976)	543 F.2d 903	10 C.D. 179.
Freezer World, Inc., et al. *v.* F.T.C., et al.		
(8th Cir. 1978)	586 F.2d 1275	12 C.D. 411.
General Dairies, Inc., et al.; F.T.C. *v.*		
(D.C. N.D. Cal. 1977)	432 F.Supp. 31	11 C.D. 65.
(D.C. Utah 1977)	Not reported	11 C.D. 595.
General Electric Company *v.* F.T.C., et al.		
(D.C. N.D. N.Y. 1976)	411 F.Supp. 10	10 C.D. 196.
General Motors Corp., et al; F.T.C. *v.*		
(D.C. N.D. Ohio 1977)	Not reported	11 C.D. 647.
General Motors Corp., et al. *v.* F.T.C., et al.		
(D.C. N.D. Ohio 1977)	Not reported	11 C.D. 667.
General Motors Corporation, et al.; F.T.C. *v.*		
(D.C. N.D. Ohio 1978)	Not reported	12 C.D. 103.
(D.C. N.D. Ohio 1978)	Not reported	12 C.D. 179.
Gibson, H.R., Sr., et al.; F.T.C. *v.*		
(5th Cir. 1978)	569 F.2d 900	12 C.D. 23.
Gibson Products of San Antonio, Inc., et al.; F.T.C. *v.*		
(5th Cir. 1978)	569 F.2d 900	12 C.D. 23.
(5th Cir. 1978)	Not reported	12 C.D. 81.
Gifford-Hill & Co., Inc. *v.* F.T.C.		
(D.C. D.C. 1976)	Not reported	10 C.D. 18.
(D.C. D.C. 1976)	Not reported	10 C.D. 136.
Glenn W. Turner Enterprises, Inc.; F.T.C. *v.*		
(D.C. M.D. Fla. 1978)	446 F.Supp. 1113	12 C.D. 15.
Glenn W. Turner; F.T.C. *v.*		
(D.C. M.D. Fla. 1978)	Not reported	12 C.D. 241.

Name of Case	Reference	Reported in—
Golden Fifty Pharmaceutical Co., Inc.; et al.; U.S. *v.* (D.C. N.D. Ill. 1976)	421 F.Supp. 1199	10 C.D. 490.
Golden Fifty Pharmaceutical Co., Inc.; U.S. *v.* (D.C. N.D. Ill. 1977)	Not reported	11 C.D. 756.
Goodyear Tire & Rubber Company, The, *v.* F.T.C., et al. (3d Cir. 1976)	530 F.2d 515	10 C.D. 101.
Great Atlantic & Pacific Tea Co., Inc., The, *v.* F.T.C. (2d Cir. 1977)	557 F.2d 971	11 C.D. 473.
Rev'd (1979)	440 U.S. 69	
Great Western Cities, Inc. of New Mexico, et al.; U.S. *v.* (D.C. C.D. Cal. 1977)	Not reported	11 C.D. 755.
Grolier, Inc., et al. *v.* F.T.C., et al. (D.C. D.C. 1976)	Not reported	10 C.D. 325.
(D.C. D.C. 1976)	Not reported	10 C.D. 549.
Grolier, Inc., et al. *v.* F.T.C., et al. (D.C. D.C. 1978)	Not reported	12 C.D. 9.
Guaranteed Quality Meats, Inc.; U.S. *v.* (D.C. W.D. Mo. 1976)	Not reported	10 C.D. 527.
Guaranteed Quality Meats, Inc., et al. *v.* F.T.C., et al. (8th Cir. 1978)	586 F.2d 1275	12 C.D. 411.
Gulf Oil Corporation, et al.; F.T.C. *v.* (D.C. S.D. N.Y. 1977)	430 F.Supp. 855	11 C.D. 121.
(2d Cir. 1977)	562 F.2d 170	11 C.D. 631.
Gulf Oil Corporation, et al. *v.* F.T.C., et al. (3d Cir. 1978)	588 F.2d 895	12 C.D. 481.
Hartnack, Carl E., et al.; F.T.C. *v.* (D.C. D.C. 1976)	Not reported	10 C.D. 543.
Hasbro Industries, Inc.; U.S. *v.* (D.C. Rhode Island 1978)	Not reported	12 C.D. 502.
Henry L. Ernstthal, et al.; F.T.C. *v.* (D.C. D.C. 1978)	Not reported	12 C.D. 99.
Heublein, Inc. *v.* F.T.C., et al. (D.C. D.C. 1978)	457 F.Supp. 52	12 C.D. 153.
Hobart Corporation *v.* F.T.C., et al. (3d Cir. 1976)	530 F.2d 515	10 C.D. 101.
Horizon Corp. *v.* F.T.C., et al. (D.C. D.C. 1976)	Not reported	10 C.D. 512.
H.R. Gibson, Sr., et al.; F.T.C. *v.* (5th Cir. 1978)	569 F.2d 900	12 C.D. 23.

Name of Case	Reference	Reported in—
Ingersoll-Rand Company *v.* F.T.C., et al.		
(D.C. N.D. N.Y. 1976)	421 F.Supp. 1004	10 C.D. 196.
Ingersoll-Rand Company, et al.; F.T.C. *v.*		
(D.C. D.C. 1978)	Not reported	12 C.D. 65.
(D.C. N.J. 1978)	462 F.Supp. 589	12 C.D. 313.
(D.C. N.J. 1978)	Not reported	12 C.D. 467.
Inland Steel Company *v.* F.T.C., et al.		
(3d Cir. 1976)	530 F.2d 515	10 C.D. 101.
ITT Continental Baking Company, Inc. *v.* F.T.C.		
(2d Cir. 1976)	532 F.2d 207	10 C.D. 138.
ITT Continental Baking Company, Inc. *v.* F.T.C., et al.		
(D.C. D.C. 1976)	Not reported	10 C.D. 193.
(D.C. D.C. 1976)	Not reported	10 C.D. 367.
J.B. Williams Company, Inc.; U.S. *v.*		
(D.C. S.D.N.Y. 1976)	Not reported	10 C.D. 565.
J.E. Lonning and Kellogg Company; F.T.C. *v.*		
(D.C. Cir. 1976)	539 F.2d 202	10 C.D. 337.
Jerry E. Feldman and Checker Taxi Company, Inc.; F.T.C. *v.*		
(7th Cir. 1976)	532 F.2d 1092	10 C.D. 126.
John Cuezze, et al.; F.T.C. *v.*		
(8th Cir. 1977)	562 F.2d 9	11 C.D. 597.
John D. MacArthur and Bankers Life and Casualty Co.; F.T.C. *v.*		
(7th Cir. 1976)	532 F.2d 1135	10 C.D. 208.
Johnson, Charles R.; U.S. *v.*		
(D.C. E.D. Md. 1976)	Not reported	10 C.D. 565.
(8th Cir. 1976)	541 F.2d 710	10 C.D. 435.
Johnson Products Company *v.* F.T.C.		
(7th Cir. 1977)	549 F.2d 35	11 C.D. 101.
J.P. Morgan & Co., Inc., et al.; F.T.C. *v.*		
(D.C. S.D. N.Y. 1977)	441 F.Supp. 234	11 C.D. 679.
J.P. Morgan & Co., Inc., et al.; F.T.C. *v.*		
(D.C. S.D. N.Y. 1978)	Not reported	12 C.D. 151.
J. Walter Thompson Company *v.* F.T.C.		
(6th Cir. 1976)	547 F.2d 954	10 C.D. 327.
Karr, Atida H., et al.; F.T.C. *v.*		
(D.C. D.C. 1978)	Not reported	12 C.D. 19.
Kellogg Company and J.E. Lonning; F.T.C. *v.*		
(D.C. Cir. 1976)	539 F.2d 202	10 C.D. 337.

Name of Case	Reference	Reported in—
Kellogg Company, et al. *v.* F.T.C., et al.		
(D.C. D.C. 1978)	Not reported	12 C.D. 499.
Kennecott Copper Corporation *v.* F.T.C.		
(10th Cir. 1976)	542 F.2d 801	10 C.D. 310.
(10th Cir. 1976)	Not reported	10 C.D. 502.
Kenneth C. Swanson, et al.; F.T.C. *v.*		
(D.C. Mass. 1976)	Not reported	10 C.D. 547.
(1st Cir. 1977)	560 F.2d 1	11 C.D. 461.
Kerr-McGee Corporation, et al. *v.* F.T.C., et al.		
(D.C. Cir. 1977)	Not reported	11 C.D. 427.
Kerr-McGee Corporation, et al. *v.* F.T.C.		
(D.C. Cir. 1978)	589 F.2d 582	12 C.D. 339.
Lancaster Colony Corp., Inc., et al.; F.T.C. *v.*		
(D.C. S.D. N.Y. 1977)	434 F.Supp. 1088	11 C.D. 535.
Lasater, Wayne, d/b/a American Bridal Consultants; U.S. *v.*		
(D.C. W.D. Okla. 1978)	Not reported	12 C.D. 502.
Lester Industries, Inc.; U.S. *v.*		
(D.C. N.D. Ohio 1977)	Not reported	11 C.D. 756.
Liggett & Myers, Incorporated *v.* F.T.C.		
(4th Cir. 1977)	567 F.2d 1273	11 C.D. 759.
Liggett Group, Inc., et al.; U.S. *v.*		
(D.C. S.D. N.Y. 1978)	Not reported	12 C.D. 39.
Line of Business Report Litigation		
(D.C. D.C. 1977)	432 F.Supp. 274	11 C.D. 39.
(D.C. D.C. 1977)	432 F.Supp. 291	11 C.D. 201.
(D.C. D.C. 1977)	Not reported	11 C.D. 509.
(D.C. D.C. 1977)	Not reported	11 C.D. 573.
Line of Business Report Litigation		
(D.C. Cir. 1978)	595 F.2d 685	12 C.D. 181.
Cert. denied (1978)	439 U.S. 958	
Line of Business Report Litigation		
(D.C. Cir. 1978)	Not reported	12 C.D. 303.
Lonning, J.E., and Kellogg Company; F.T.C. *v.*		
(D.C. Cir. 1976)	539 F.2d 202	10 C.D. 337.
Lorillard Division of Loew's Theatres, Inc., et al.; U.S. *v.*		
(D.C. S.D. N.Y. 1978)	Not reported	12 C.D. 39.
Lowe's Food Stores, et al.; F.T.C. *v.*		
(4th Cir. 1976)	539 F.2d 1339	10 C.D. 395.
Lowe's Food Stores, et al.; F.T.C. *v.*		
(4th Cir. 1977)	547 F.2d 247	11 C.D. 7.

Name of Case	Reference	Reported in—
Lukens Steel Company, et al.; F.T.C. *v.* (D.C. D.C. 1977)	444 F.Supp. 803	11 C.D. 113.
Lukens Steel Company, et al.; F.T.C. *v.* (D.C. D.C. 1978)	454 F.Supp. 1182	12 C.D. 125.
Markin, David R., and Checker Motors Corporation; F.T.C. *v.* (6th Cir. 1976)	532 F.2d 541	10 C.D. 174.
Maxwell Auslander; U.S. *v.* (D.C. Md. 1978)	Not reported	12 C.D. 501.
Maylis Textile Corporation, et al.; U.S. *v.* (D.C. S.D. N.Y. 1978)	Not reported	12 C.D. 501.
Mellon National Corporation, et al. *v.* F.T.C., et al. (2d Cir. 1976)	538 F.2d 937	10 C.D. 349.
Mellon National Corporation, et al.; F.T.C. *v.* (D.C. S.D. N.Y. 1977)	441 F.Supp. 234	11 C.D. 679.
Mellon National Corporation, et al.; F.T.C. *v.* (D.C. S.D. N.Y. 1978)	Not reported	12 C.D. 151.
Merck & Co., Inc. *v.* F.T.C. (3d Cir. 1976)	530 F.2d 515	10 C.D. 101.
Merck and Company, Inc.; U.S. *v.* (D.C. D.C. 1978)	Not reported	12 C.D. 501.
Mervin, Michael N. *v.* F.T.C. (D.C. Cir. 1978)	591 F.2d 821	12 C.D. 375.
Mid-States Mortgage Corporation, et al.; U.S. *v.* (D.C. E.D. Mich. 1978)	Not reported	12 C.D. 502.
Midwestern Meat Processors, Inc., et al. *v.* F.T.C. (8th Cir. 1978)	586 F.2d 1275	12 C.D. 411.
Miller, Ralph M., et al.; F.T.C. *v.* (7th Cir. 1977)	549 F.2d 452	11 C.D. 159.
Miller, Ralph H., Bill R. Privitt, and Morgan Drive Away, Inc.; F.T.C. *v.* (D.C. N.D. Ind. 1976)	406 F.Supp. 305	10 C.D. 1.
Mobil Oil Corporation *v.* F.T.C., et al. (D.C. S.D. N.Y. 1976)	406 F.Supp. 305	10 C.D. 1.
Mobil Oil Corporation, et al.; F.T.C. *v.* (D.C. Cir. 1977)	555 F.2d 862	11 C.D. 253.
Cert. denied (1977)	431 U.S. 974	
Mobil Oil Corporation *v.* F.T.C., et al. (D.C. S.D. N.Y. 1977)	430 F.Supp. 849	11 C.D. 91.

Name of Case	Reference	Reported in—
Mobil Oil Corporation, et al. *v.* F.T.C., et al.		
(D.C. S.D. N.Y. 1977)	430 F.Supp. 855	11 C.D. 121.
(2d Cir. 1977)	562 F.2d 170	11 C.D. 631.
Mobil Oil Corporation *v.* F.T.C., et al.		
(D.C. S.D. N.Y. 1978)	Not reported	12 C.D. 477.
Mobil Oil Corporation, et al. *v.* F.T.C., et al.		
(3d Cir. 1978)	588 F.2d 895	12 C.D. 481.
Morgan Guaranty Trust Company, et al. *v.* F.T.C., et al.		
(2d Cir. 1976)	538 F.2d 937	10 C.D. 349.
National Automobile Dealers Association, et al. *v.* F.T.C., et al.		
(D.C. N.D. La. 1976)	421 F.Supp. 21	10 C.D. 440.
National Chinchilla, Inc., et al.; U.S. *v.*		
(D.C. Kans. 1977)	Not reported	11 C.D. 755.
National Commission on Egg Nutrition, et al. *v.* F.T.C.		
(7th Cir. 1977)	570 F.2d 157	11 C.D. 697.
Cert. denied (1978)	439 U.S. 821	
Northwest Industries, Inc. *v.* F.T.C., et al.		
(3d Cir. 1976)	530 F.2d 515	10 C.D. 101.
O.K. Tire & Rubber Co.; U.S. *v.*		
(D.C. Idaho 1976)	Not reported	10 C.D. 320.
O.K. Tire & Rubber Co.; U.S. *v.*		
(D.C. Idaho 1978)	Not reported	12 C.D. 309.
(D.C. Idaho 1978)	Not reported	12 C.D. 367.
Orange County Dental Society, Inc., et al.; F.T.C. *v.*		
(D.C. D.C. 1978)	Not reported	12 C.D. 99.
Oscar Mayer & Co., Inc., *v.* F.T.C., et al.		
(3d Cir. 1976)	530 F.2d 515	10 C.D. 101.
Packers Brand Meats, Inc., et al.; F.T.C. *v.*		
(8th Cir. 1977)	562 F.2d 9	11 C.D. 597.
Panacolor, Inc., et al.; U.S. *v.*		
(D.C. D.C. 1978)	Not reported	12 C.D. 503.
Papercraft Corporation; U.S. *v.*		
(3d Cir. 1976)	540 F.2d 131	10 C.D. 352.
Papercraft Corp.; U.S. *v.*		
(D.C. W.D. Pa. 1977)	426 F.Supp. 916	11 C.D. 29.
Patrick R. Faltico; U.S. *v.*		
(8th Cir. 1978)	586 F.2d 1267	12 C.D. 405.
Peacock Buick, Inc., et al. *v.* F.T.C.		
(4th Cir. 1977)	Not reported	11 C.D. 199.

Name of Case	Reference	Reported in—
Pendleton, William H., et al. *v.* Trans Union Systems Corp., et al. (D.C. E.D. Pa. 1977)	430 F.Supp. 95	11 C.D. 181.
Pepsico, Inc., et al. *v.* F.T.C. (2d Cir. 1978)	Not reported	12 C.D. 113.
Pepsi-Cola Albany Bottling Co., Inc., et al. *v.* F.T.C. (2d Cir. 1978)	Not reported	12 C.D. 113.
Pertschuk, Michael; Donald L. Bachman *v.* (D.C. D.C. 1977)	437 F.Supp. 234	11 C.D. 679.
(D.C. D.C. 1978)	Not reported	12 C.D. 45.
Pharmaceutical Research Association; U.S. *v.* (D.C. Conn. 1978)	Not reported	12 C.D. 503.
Philip Morris Incorporated, et al.; U.S.*v*. (D.C. S.D. N.Y. 1978)	Not reported	12 C.D. 39.
Piser & Company, Inc.; U.S. *v.* (D.C. S.D. N.Y. 1977)	Not reported	11 C.D. 756.
Post-Keys-Gardner, Inc., et al.; F.T.C. *v.* (D.C. D.C. 1977)	Not reported	11 C.D. 729.
Prime Meats, Inc., et al. *v.* F.T.C., et al. (8th Cir. 1978)	586 F.2d 1275	12 C.D. 411.
Privitt, Bill, et al.; F.T.C. *v.* (D.C. N.D. Ind. 1976)	Not reported	10 C.D. 260.
Privitt, Bill, et al.; F.T.C. *v.* (7th Cir. 1977)	549 F.2d 452	11 C.D. 159.
Ralph H. Miller, Bill R. Privitt, and Morgan Drive Away, Inc.; F.T.C. *v.* (D.C. N.D. Ind. 1976)	Not reported	10 C.D. 260.
Ralph M. Miller, et al.; F.T.C. *v.* (7th Cir. 1977)	549 F.2d 452	11 C.D. 159.
Raymond A. Anderson *v.* F.T.C., et al. (D.C. N.D. Ill. 1978)	Not reported	12 C.D. 5.
Reader's Digest Association, Inc.; U.S. *v.* (D.C. Del. 1978)	Not reported	12 C.D. 77.
(D.C. Del. 1978)	464 F.Supp. 1037	12 C.D. 439.
Retail Credit Co. *v.* F.T.C., et al. (D.C. D.C. 1976)	Not reported	10 C.D. 68.
(D.C. D.C. 1976)	Not reported	10 C.D. 305.
(D.C. D.C. 1976)	Not reported	10 C.D. 405.

Name of Case	Reference	Reported in—
Reuben H. Donnelley Corp., The, *v.* F.T.C., et al.		
(D.C. N.D. Ill. 1977)	Not reported	11 C.D. 651.
(D.C. N.D. Ill. 1977)	Not reported	11 C.D. 733.
Reuben H. Donnelley Corporation *v.* F.T.C.		
(7th Cir. 1978)	580 F.2d 264	12 C.D. 231.
Rhinechem Corporation, et al.; F.T.C. *v.*		
(D.C. N.D. Ill. 1978)	459 F.Supp. 785	12 C.D. 357.
Richard Weiner, Inc., et al. *v.* F.T.C.		
(7th Cir. 1977)	570 F.2d 157	11 C.D. 697.
Cert. denied (1978)	439 U.S. 821	
R.J. Reynolds Tobacco Co., Inc., et al.; U.S. *v.*		
(D.C. S.D.N.Y. 1978)	Not reported	12 C.D. 39.
(D.C. S.D.N.Y. 1978)	Not reported	12 C.D. 373.
Robert O. Anderson, et al.; F.T.C. *v.*		
(D.C. D.C. 1977)	442 F.Supp. 1118	11 C.D. 713.
Robert O. Anderson, et al.; F.T.C. *v.*		
(D.C. D.C. 1978)	Not reported	12 C.D. 1.
Rockefeller, David, et al.; F.T.C. *v.*		
(D.C. S.D.N.Y. 1977)	441 F.Supp. 234	11 C.D. 679.
Rockefeller, David, et al.; F.T.C. *v.*		
(D.C. S.D.N.Y. 1978)	Not reported	12 C.D. 151.
Rubbermaid, Incorporation *v.* F.T.C.		
(6th Cir. 1978)	575 F.2d 1169	12 C.D. 67.
Safeway Stores, Inc.; U.S. *v.*		
(D.C. Md. 1976)	Not reported	10 C.D. 519.
Safeway Stores Incorporated *v.* F.T.C., et al.		
(D.C. D.C. 1977)	428 F.Supp. 346	11 C.D. 27.
Safeway Stores Incorporated; U.S. *v.*		
(D.C. Md. 1977)	Not reported	11 C.D. 756.
Saks & Co., et al.; U.S. *v.*		
(D.C. S.D. N.Y. 1976)	426 F.Supp. 812	10 C. . 551.
SCM Corporation *v.* F.T.C.		
(2d Cir. 1977)	565 F.2d 807	11 C.D. 739.
Seligman and Associates, Inc., et al.; U.S. *v.*		
(D.C. E.D. Mich. 1978)	Not reported	12 C.D. 502.
Shell Oil Company, et al.; F.T.C. *v.*		
(D.C. Cir. 1977)	555 F.2d 862	11 C.D. 253.
Cert. denied (1977)	431 U.S. 974	
Shell Oil Company, et al. *v.* F.T.C., et al.		
(D.C. S.D. N.Y. 1977)	430 F.Supp. 855	11 C.D. 121.
(2d Cir. 1977)	562 F.2d 170	11 C.D. 631.

Name of Case	Reference	Reported in—
Sid Casey, et al. *v.* F.T.C. (D.C. W.D. Wash. 1977)	Not reported	11 C.D. 457.
Sid Casey, et al. *v.* F.T.C. Sid Casey, et al.; F.T.C. *v.* (9th Cir. 1978)	578 F.2d 793	12 C.D. 115.
Sid Cockrell, et al.; F.T.C. *v.* (D.C. D.C. 1977)	431 F.Supp. 558	11 C.D. 175.
(D.C. D.C. 1977)	431 F.Supp. 561	11 C.D. 191.
Simeon Management Corporation, et al.; F.T.C. *v.* (9th Cir. 1976)	532 F.2d 708	10 C.D. 161.
Simeon Management Corporation, et al. *v.* F.T.C. (9th Cir. 1978)	579 F.2d 1137	12 C.D. 215.
Spiegel, Inc. *v.* F.T.C. (7th Cir. 1976)	540 F.2d 287	10 C.D. 382.
Standard Oil Company, et al.; F.T.C. *v.* (D.C. Cir. 1977)	555 F.2d 862	11 C.D. 253.
Cert. denied (1977)	431 U.S. 974	
Standard Oil Company (Indiana), et al. *v.* F.T.C., et al. (3d Cir. 1978)	588 F.2d 895	12 C.D. 481.
Standard Oil Company of California, et al. *v.* F.T.C., et al. (D.C. Cir. 1977)	555 F.2d 862	11 C.D. 253.
Cert. denied (1977)	431 U.S. 974	
Standard Oil Company of California, et al. *v.* F.T.C., et al. (D.C. S.D. N.Y. 1977)	430 F.Supp. 855	11 C.D. 121.
(2d Cir. 1977)	562 F.2d 170	11 C.D. 631.
Standard Oil Company of California, et al. *v.* F.T.C. (9th Cir. 1978)	577 F.2d 653	12 C.D. 165.
(3d Cir. 1978)	588 F.2d 895	12 C.D. 481.
Stanley H. Kaplan Educational Center, Ltd.; F.T.C. *v.* (D.C. Mass. 1977)	433 F.Supp. 989	11 C.D. 465.
State of California ex rel. C.B. Christensen, et al. *v.* F.T.C., et al. (9th Cir. 1977)	549 F.2d 1321	11 C.D. 151.
Cert. denied (1977)	434 U.S. 876	
STP Corporation; U.S. *v.* (D.C. S.D.N.Y. 1978)	Not reported	12 C.D. 501.
Subscription Bureau Limited, et al.; U.S. *v.* (D.C. E.D. Va. 1976)	Not reported	10 C.D. 565.

Name of Case	Reference	Reported in—
Superior Oil Company, Inc., et al.,The; F.T.C. *v.*		
(D.C. Cir. 1977)	555 F.2d 862	11 C.D. 253.
Cert. denied (1977)	431 U.S. 974	
Swanson, Kenneth C., et al.; F.T.C. *v.*		
(D.C. Mass. 1976)	Not reported	10 C.D. 547.
Swanson, Kenneth C.; F.T.C. *v.*		
(1st Cir. 1977)	560 F.2d 1	11 C.D. 461.
Tallman Piano Store, Inc., et al.; U.S. *v.*		
(D.C. Ore. 1977)	Not reported	11 C.D. 755.
Ted Bates & Company, Inc. *v.* F.T.C.		
(2d Cir. 1976)	532 F.2d 207	10 C.D. 138.
Tenneco, Inc., et al.; F.T.C. *v.*		
(D.C. D.C. 1977)	433 F.Supp. 105	11 C.D. 441.
(D.C. Cir. 1977)	Not reported	11 C.D. 459.
Texaco, Inc. and Consolidated Cases; F.T.C. *v.*		
(D.C. Cir. 1976)	Not reported	10 C.D. 100.
Texaco, Inc., et al.; F.T.C. *v.*		
(D.C. Cir. 1977)	555 F.2d 862	11 C.D. 253.
Cert. denied (1977)	431 U.S. 974	
Texaco, Inc., et al.; F.T.C. *v.*		
(D.C. D.C. 1978)	Not reported	12 C.D. 1.
The Anaconda Co., and Atlantic Richfield Co.; F.T.C. *v.*		
(D.C. E.D. Va. 1976)	Not reported	10 C.D. 507.
The Anaconda Co., et al.; F.T.C. *v.*		
(4th Cir. 1977)	549 F.2d 289	11 C.D. 11.
The Chase Manhattan Bank, et al. *v.* F.T.C., et al.		
(2d Cir. 1976)	358 F.2d 937	10 C.D. 349.
The Chase Manhattan Corp., et al.; F.T.C. *v.*		
(D.C. S.D.N.Y. 1978)	Not reported	12 C.D. 151.
The City Sewing Machine Company, Inc.; U. S. *v.*		
(D.C. Kans. 1978)	Not reported	12 C.D. 503.
The Firestone Tire & Rubber Co.; U.S. *v.*		
(D.C. N.D. Ohio 1976)	Not reported	10 C.D. 121.
The Goodyear Tire & Rubber Company *v.* F.T.C., et al.		
(3d Cir. 1976)	530 F.2d 515	10 C.D. 101.
The Great Atlantic & Pacific Tea Company, Inc. *v.* F.T.C.		
(2d Cir. 1977)	557 F.2d 971	11 C.D. 473.
Cert. granted (1978)	435 U.S. 922	

Name of Case	Reference	Reported in—
The Reuben H. Donnelley Corp. *v.* F.T.C.		
(D.C. N.D. Ill. 1977)	Not reported	11 C.D. 651.
(D.C. N.D. Ill. 1977)	Not reported	11 C.D. 733.
The Superior Oil Company, Inc., et al.; F.T.C. *v.*		
(D.C. Cir. 1977)	555 F.2d 862	11 C.D. 253.
Cert. denied (1977)	431 U.S. 974	
Thomas J. Lipton, Inc. *v.* F.T.C., et al.		
(3d Cir. 1976)	530 F.2d 515	10 C.D. 101.
Thrifty Drug Stores Co., Inc. *v.* F.T.C.		
(D.C. D.C. 1976)	Not reported	10 C.D. 504.
(D.C. D.C. 1976)	Not reported	10 C.D. 555.
Tokyo Boeki (U.S.A.), Inc., et al.; U.S. *v.*		
(D.C. S.D.N.Y. 1977)	Not reported	11 C.D. 756.
Top Value Meats, Inc., et al. *v.* F.T.C., et al.		
(D.C. W.D. Mo. 1976)	Not reported	10 C.D. 527.
Top Value Meats, Inc., et al. *v.* F.T.C., et al.		
(8th Cir. 1978)	586 F.2d 1275	12 C.D. 411.
Torrington Company, et al., The *v.* F.T.C., et al.		
(D.C. N.J. 1978)	462 F.Supp. 589	12 C.D. 313.
(D.C. N.J. 1978)	Not reported	12 C.D. 467.
Trans Union Systems Corp., et al.; William H. Pendleton, et al. *v.*		
(D.C. E.D. Pa. 1977)	430 F.Supp. 95	11 C.D. 181.
Tri-State Home Improvement Co., Inc.; U.S. *v.*		
(D.C. E.D. Wis. 1977)	Not reported	11 C.D. 77.
(D.C. E.D. Wis. 1977)	Not reported	11 C.D. 757.
Tropicana Products, Inc., et al.; F.T.C. *v.*		
(7th Cir. 1978)	Not reported	12 C.D. 229.
(D.C. Cir. 1978)	587 F.2d 1225	12 C.D. 277.
Turner, Glenn W.; F.T.C. *v.*		
(D.C. M.D. Fla. 1978)	Not reported	12 C.D. 241.
Twin City Beef Company, et al. *v.* F.T.C., et al.		
(8th Cir. 1978)	586 F.2d 1275	12 C.D. 411.
Union Carbide Corporation, et al. *v.* F.T.C., et al.		
(D.C. Cir. 1977)	Not reported	11 C.D. 427.
Union Carbide Corporation, et al. *v.* F.T.C., et al.		
(D.C. Cir. 1978)	589 F.2d 582	12 C.D. 339.

Name of Case	Reference	Reported in—
United States Borax & Chemical Corp.; F.T.C. *v.* (D.C. D.C. 1978)	Not reported	12 C.D. 7.
Universal Electronics Corporation, et al.; U.S. *v.* (D.C. E.D. Mo. 1977)	Not reported	11 C.D. 755.
Upper Snake River Valley Dairymen's Association, Inc., et al.; F.T.C. *v.* (D.C. N.D. Cal. 1977)	432 F.Supp. 31	11 C.D. 65.
(D.C. Utah 1977)	Not reported	11 C.D. 595.
U.S. *v.* A.B.C. Fabrics of Tampa, Inc., et al. (D.C. M.D. Fla. 1977)	Not reported	11 C.D. 755.
U.S. *v.* American Brands, Inc., et al. (D.C. S.D.N.Y. 1978)	Not reported	12 C.D. 39.
U.S. *v.* American Consumer, Inc., et al. (D.C. D.C. 1978)	Not reported	12 C.D. 503.
U.S. *v.* Americana Corporation (D.C. N.J. 1976)	Not reported	11 C.D. 1.
(D.C. N.J. 1976)	Not reported	11 C.D. 5.
U.S. *v.* Amrep Corp., et al. (D.C. S.D. N.Y. 1977)	Not reported	11 C.D. 645.
(D.C. S.D. N.Y. 1977)	Not reported	11 C.D. 737.
U.S. *v.* A & R Agency, Inc., et al. (D.C. N.D. Ill. 1976)	Not reported	10 C.D. 377.
U.S. *v.* ARA Services (D.C. Mo. 1978)	Not reported	12 C.D. 269.
(D.C. Mo. 1978)	Not reported	12 C.D. 273.
U.S. *v.* Ascot Oils, Inc. (D.C. N.D. Tex. 1978)	Not reported	12 C.D. 504.
U.S. *v.* Bestline Products Corporation, et al. (D.C. N.D. Cal. 1976)	412 F.Supp. 754	10 C.D. 223.
(D.C. N.D. Cal. 1976)	Not reported	10 C.D. 565.
U.S. *v.* Book-of-the-Month Club, Inc. (D.C. S.D.N.Y. 1978)	Not reported	12 C.D. 502.
U.S. *v.* Bridgestone Tire Company of America, Inc. (D.C. C.D. Cal. 1978)	Not reported	12 C.D. 501.
U.S. *v.* Brown & Williamson Tobacco Corp., et al. (D.C. S.D.N.Y. 1978)	Not reported	12 C.D. 39.
U.S. *v.* Browning Arms Company (D.C. Utah 1976)	Not reported	10 C.D. 566.
U.S. *v.* Canyon House, Inc., et al. (D.C. D.C. 1978)	Not reported	12 C.D. 503.
U.S. *v.* Charles R. Johnson (D.C. E.D. Md. 1976)	Not reported	10 C.D. 565.
(8th Cir. 1976)	541 F.2d 710	10 C.D. 435.

Name of Case	Reference	Reported in—
U.S. *v.* Disco Oil Company (D.C. N.D. Ill. 1978)	Not reported	12 C.D. 503.
U.S. *v.* Dobbs, Inc. (D.C. E.D. Mich. 1978)	Not reported	12 C.D. 503.
U.S. *v.* Federated Department Stores, Inc. (D.C. S.D. Ohio 1978)	Not reported	12 C.D. 503.
U.S. *v.* Firestone Tire & Rubber Company (D.C. N.D. Ohio 1976)	Not reported	10 C.D. 565.
U.S. *v.* Four States Builders and Remodelers, Inc. (D.C. N.J. 1978)	Not reported	12 C.D. 501.
U.S. *v.* Golden Fifty Pharmaceutical Co., Inc., et al. (D.C. N.D. Ill. 1976)	421 F.Supp. 1199	10 C.D. 490.
U.S. *v.* Golden Fifty Pharmaceutical Co., Inc., et al. (D.C. N.D. Ill. 1977)	Not reported	11 C.D. 756.
U.S. *v.* Great Western Cities, Inc. of New Mexico, et al. (D.C. C.D. Cal. 1977)	Not reported	11 C.D. 755.
U.S. *v.* Guaranteed Quality Meats, Inc. (D.C. W.D. Mo. 1976)	Not reported	10 C.D. 527.
U.S. *v.* Guaranteed Quality Meats, Inc. (8th Cir. 1978)	586 F.2d 1275	12 C.D. 411.
U.S. *v.* Hasbro Industries, Inc. (D.C. Rhode Island 1978)	Not reported	12 C.D. 502.
U.S. *v.* Lester Industries, Inc. (D.C. N.D. Ohio 1977)	Not reported	11 C.D. 756.
U.S. *v.* Liggett Group, Inc., et al. (D.C. S.D.N.Y. 1978)	Not reported	12 C.D. 39.
U.S. *v.* Lorillard Division of Loew's Theatres, Inc. (D.C. S.D.N.Y. 1978)	Not reported	12 C.D. 39.
U.S. *v.* Maxwell Auslander (D.C. Md. 1978)	Not reported	12 C.D. 501.
U.S. *v.* Maylis Textile Corporation, et al. (D.C. S.D.N.Y. 1978)	Not reported	12 C.D. 501.
U.S. *v.* Merck and Company, Inc. (D.C. D.C. 1978)	Not reported	12 C.D. 501.
U.S. *v.* Mid-States Mortgage Corporation, et al. (D.C. E.D. Mich. 1978)	Not reported	12 C.D. 502.

Name of Case	Reference	Reported in—
U.S. *v.* O.K. Tire & Rubber Co. (D.C. Idaho 1976)	Not reported	10 C.D. 320
U.S. *v.* O.K. Tire & Rubber Co. (D.C. Idaho 1978)	Not reported	12 C.D. 309.
(D.C. Idaho 1978)	Not reported	12 D.C. 367.
U.S. *v.* Panacolor, Inc., et al. (D.C. D.C. 1978)	Not reported	12 C.D. 503.
U.S. *v.* Patrick R. Faltico (8th Cir. 1978)	586 F.2d 1267	12 C.D. 405.
U.S. *v.* Papercraft Corporation (3d Cir. 1976)	540 F.2d 131	10 C.D. 352.
U.S. *v.* Papercraft Corp. (D.C. W.D. Pa. 1977)	426 F.Supp. 916	11 C.D. 29.
U.S. *v.* Pharmaceutical Research Association (D.C. Conn. 1978)	Not reported	12 C.D. 503.
U.S. *v.* Philip Morris Incorporated, et al. (D.C. S.D. N.Y. 1978)	Not reported	12 C.D. 39.
U.S. *v.* Piser & Company, Inc. (D.C. S.D. N.Y. 1977)	Not reported	11 C.D. 756.
U.S. *v.* Reader's Digest Association, Inc. (D.C. Del. 1978)	Not reported	12 C.D. 77.
(D.C. Del. 1978)	464 F.Supp. 1037	12 C.D. 439.
U.S. *v.* R.J. Reynolds Tobacco Co., Inc., et al. (D.C. S.D. N.Y. 1978)	Not reported	12 C.D. 39.
(D.C. S.D. N.Y. 1978)	Not reported	12 C.D. 373.
U.S. *v.* Safeway Stores, Inc. (D.C. Md. 1976)	Not reported	10 C.D. 512.
U.S. *v.* Safeway Stores, Incorporated (D.C. Md. 1977)	Not reported	11 C.D. 756.
U.S. *v.* Saks & Co., et al. (D.C. S.D. N.Y. 1976)	Not reported	10 C.D. 551.
U.S. *v.* Seligman and Associates, Inc., et al. (D.C. E.D. Mich. 1978)	Not reported	12 C.D. 502.
U.S. *v.* STP Corporation (D.C. S.D. N.Y. 1978)	Not reported	12 C.D. 501.
U.S. *v.* Subscription Bureau Limited, et al. (D.C. E.D. Va. 1976)	Not reported	10 C.D. 565.
U.S. *v.* Tallman Piano Stores, Inc., et al. (D.C. Ore. 1977)	Not reported	11 C.D. 755.
U.S. *v.* The City Sewing Machine Company, Inc. (D.C. Kans. 1978)	Not reported	12 C.D. 503.
U.S. *v.* The Firestone Tire & Rubber Co. (D.C. N.D. Ohio 1976)	Not reported	11 0.D. 565.

Name of Case	Reference	Reported in—
U.S. *v.* The J.B. Williams Company, Inc. (D.C. S.D.N.Y. 1976)	Not reported	10 C.D. 565.
U.S. *v.* Tokyo Boeki (U.S.A.), Inc., et al. (D.C. E.D. Wis. 1977)	Not reported	11 C.D. 756.
U.S. *v.* Tri-State Home Improvement Co., Inc. (D.C. E.D. Wis. 1977)	Not reported	11 C.D. 77.
(D.C. E.D. Wis. 1977)	Not reported	11 C.D. 756.
U.S. *v.* Universal Electronics Corporations, et al. (D.C. E.D. Mo. 1977)	Not reported	11 C.D. 755.
U.S. *v.* Verlan Industries, Inc. (D.C. E.D.N.Y. 1978)	Not reported	12 C.D. 502.
U.S. *v.* Wayne Lasater d/b/a American Bridal Consultants (D.C. W.D. Okla. 1978)	Not reported	12 C.D. 502.
U.S. *v.* Westinghouse Security Systems, Inc. (D.C. W.D. Pa. 1978)	Not reported	12 C.D. 502.
U.S. *v.* Whipple Brothers, Inc. (D.C. M.D. Pa. 1977)	Not reported	11 C.D. 756.
U.S. *v.* Whitehill Systems, Inc., et al. (D.C. N.Y. 1977)	Not reported	11 C.D. 755.
Warner-Lambert Company *v.* F.T.C. (D.C. Cir. 1977)	562 F.2d 749	11 C.D. 601
Cert. denied (1978)	435 U.S. 950	
Washington Federal Savings and Loan Assoc. of Miami Beach, et al. *v.* F.T.C., et al. (D.C. D.C. 1977)	435 F.Supp. 24	11 C.D. 33
Wayne Lasater d/b/a American Bridal Consultants; U.S. *v.* (D.C. W.D. Okla. 1978)	Not reported	12 C.D. 502
Western General Dairies, Inc., et al.; F.T.C. *v.* (D.C. N.D. Cal. 1977)	432 F.Supp. 31	11 C.D. 65
(D.C. Utah 1977)	Not reported	11 C.D. 265
Westinghouse Electric Corp. *v.* F.T.C., et al. (D.C. S.D. Ohio 1976)	Not reported	10 C.D. 265
Westinghouse Security Systems, Inc.; U.S. *v.* (D.C. W.D. Pa. 1978)	Not reported	12 C.D. 502
Whipple Brothers, Inc.; U.S. *v.* (D.C. M.D. Pa. 1977)	Not reported	11 C.D. 756
Whitehill Systems, Inc., et al.; U.S. *v.* (D.C. N.Y. 1977)	Not reported	11 C.D. 755

Name of Case	Reference	Reported in—
William H. Pendleton, et al. *v.* Trans Union Systems Corp., et al.		
(D.C. E.D. Pa. 1977)	430 F.Supp. 95	11 C.D. 181
W.L. Wearly, et al.; F.T.C. *v.*		
(D.C. D.C. 1978)	Not reported	12 C.D. 65
Aff'd (1979)	598 F.2d 310	
W.L. Wearly, et al. *v.* F.T.C., et al.		
(D.C. N.J. 1978)	462 F.Supp. 589	12 C.D. 313
(D.C. N.J. 1978)	Not reported	12 C.D. 465
Winters National Bank and Trust Co.; F.T.C. *v.*		
(D.C. S.D. Ohio 1978)	Not reported	12 C.D. 59

FEDERAL TRADE COMMISSION v. ROBERT O. ANDERSON et al.*

Misc. No. 77-161. F.T.C. Docket No. 8934.

(United States District Court, District of Columbia, January 11, 1978)

On motion of the joint respondents for a stay or temporary sequestration order pending appeal of court's subpoena enforcement order, court held that oil companies had failed to demonstrate either the likelihood of success on the merits of the appeal, or substantial injury resulting from denial of relief sought, whereas both other interested parties and the public interest would be harmed if there was any additional delay in the proceeding. On Texaco, Inc.'s motion for reconsideration amendment, court held that arguments presented by the company were no more persuasive than those previously considered.

Therefore, both motions would be denied.

Ordered accordingly.

Before FLANNERY, *District Judge.*

MEMORANDUM OPINION AND ORDER

This matter comes before the court on the motion of the joint respondents[1] for a stay or temporary sequestration order pending appeal and the motion of Texaco, Inc. for reconsideration and amendment of this court's Memorandum Opinion and Order of December 13, 1977 or for a stay pending appeal. The FTC and all respondents have agreed that the respondents will not be obligated to comply with the subpoenas until January 16, 1978 in order to provide this court and, if necessary, the United States Court of Appeals for the District of Columbia Circuit the opportunity to consider respondents' requests for a stay.

The four factors to be considered in deciding whether a stay of enforcement of a court's order is appropriate were articulated by the Court of Appeals in *Virginia Petroleum Jobbers Association* v. *FPC*, 259 F.2d 291, 295 (D.C.Cir. 1958). The relevant inquiries are:

(1) Has the petitioner made a strong showing that it is likely to prevail on the merits of its appeal? . . . (2) Has the petitioner shown that without such relief, it will be irreparably injured? . . . (3) Would the issuance of a stay substantially harm other parties interested in the proceedings? . . . (4) Where lies the public interest?

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*Not reported in Federal Reporter. Reported in Trade Reg. Rep. ¶ 61,851 at 73,562 (1978-1 Trade Cases).

[1] The term "joint respondents" shall be used in reference to all of the corporate respondents to this action and their individually named chief executive officers, except Texaco, Inc. and Maurice F. Granville. Respondents shall be used in reference to all of the respondents.

295 F.2d at 925. In *Washington Metropolitan Area Transit Commission* v. *Holiday Tours, Inc.*, the court clarified the applicability of the criteria in certain circumstances. 559 F.2d 841, 843 (D.C. Cir. 1977). The court dealt with the situation where the petitioner is unable to show that it is likely to prevail on the merits of the appeal. The court stated that:

> [A] court, when confronted with a case in which the other three factors strongly favor interim relief may exercise its discretion to grant a stay if the movant has made a substantial case on the merits. The court is not required to find that ultimate success by the movant is a mathematical probability, and indeed, as in this case, may grant a stay even though its own approach may be contrary to movant's view of the merits. The necessary "level" or "degree" of possibility of success will vary according to the court's assessment of the other factors.

559 F.2d at 843. In essence, the court advocated a more flexible interpretation of the "probability of success" requirement in relation to the other criteria.

Application of the criteria to the facts of this case leads this court to the conclusion that a stay is not warranted. The respondents have not demonstrated that they are likely to succeed on the merits of the appeal. Furthermore, the balance of the other three factors also does not justify a stay upon a lesser showing of probability of success. In balancing the relevant factors, the court also has concluded that issuance of a temporary sequestration order is not appropriate.

A reading of this court's decision of December 13, 1977 will reveal this court's opinion of petitioner's likelihood of success on appeal. The issues raised by the respondents in their motions for a stay also have not persuaded the court to intrude "into the ordinary process of administrative and judicial review." See *Virginia Petroleum Jobbers Ass'n, supra*, 259 F.2d at 295. Although this case does raise serious legal questions, the court firmly believes that there is ample authority to support the Commission's actions in the *Exxon* proceeding and enforcement of the subpoenas. The court, however, is required by *Washington Metropolitan Area Transit Comm'n* to consider the weight of the other three factors to determine whether a stay should be granted despite its view of the merits.

The court finds that the respondents will not be irreparably injured if a stay is not granted. Respondents contend that substantial issues might be mooted in the absence of a stay once the subpoenas are complied with. The court does not believe that any serious legal questions will be mooted because respondents' confidential documents are subject to the ALJ's protective order, as modified by the Commission and nonconfidential documents can be protected in the other pending cases, if necessary. Respondents also will have the opportunity to seek protection of their confidential documents when release is immi-

nent because of the notice provisions of the protective order. The court also notes that the questions raised only by Texaco will not be mooted by compliance with the subpoenas as required by this court's order. See *FTC* v. *Browning,* 435 F.2d 96, 97-98 n. 1 (D.C.Cir. 1970). Furthermore, any other possible injury that might result from the failure to issue a stay would be subject to "adequate compensatory or other corrective relief" at a later date. See *Virginia Petroleum Jobbers Ass'n, supra,* 259 F.2d at 925.

The issuance of a stay would substantially harm other parties interested in the proceedings. As the court indicated in its earlier opinion, this administrative proceeding began on July 18, 1973 and complaint counsel's motion for issuance of the subpoenas in question was granted by the ALJ on November 11, 1976. There has been continual delay in the resolution of this case at the administrative level. The FTC would be faced with further substantial delay in the processing of this case if a stay or temporary sequestration order was issued. Absent unique compelling circumstances, stays are particularly inappropriate in the context of a subpoena enforcement action due to the harm from delay factor. See *Federal Maritime Commission* v. *New York Terminal Conference,* 373 F.2d 424, 426 (2d Cir. 1967).

Finally, the public interest clearly favors denial of a stay in this case. There is a substantial public interest in effective and immediate enforcement of the antitrust laws. *Cf. Blackwelder Furniture Co.* v. *Seilig Manufacturing Co.,* 550 F.2d 189, 197 (4th Cir. 1977). The merits of respondents' claims have been considered at the administrative and trial court level, thus satisfying the public interest in the resolution and review of the issues raised. Therefore, the court concludes that the factors of irreparable injury, harm to other parties, and the public interest do not weigh in favor of the grant of a stay despite the respondents' failure to show a substantial probability of success on appeal. For the same reasons discussed in reference to the stay, the court also finds that a temporary sequestration order is not warranted.

Finally, Texaco has moved for reconsideration and amendment of this court's Memorandum Opinion and Order of December 13, 1977. In enforcing the subpoenas issued in this case, the court carefully considered the arguments and issues raised by Texaco. Despite Texaco's protestations to the contrary, the court did not overlook or misapprehend Texaco's assertions. In its earlier opinion, the court considered the relevancy of the requests, the nature of the subpoenas, the sufficiency of the complaint, and the scope of the Commission's authority. The arguments presented by Texaco in its motion for reconsideration and amendment are no more persuasive than its

earlier assertions. The court, therefore, will deny Texaco's motion for reconsideration and amendment.

Order

Upon consideration of the joint respondents' motion for a stay or temporary sequestration order pending appeal, the motion of Texaco, Inc. for reconsideration and amendment or for a stay pending appeal, and the opposition thereto, in accordance with the memorandum opinion above, it is, by the court, this 11th day of January, 1978

Ordered that the joint respondents' motion for a stay or temporary sequestration order pending appeal be, and the same hereby is, denied; and it is further

Ordered that the motion of Texaco, Inc. for reconsideration amendment or for a stay pending appeal be, and the same hereby is denied.

RAYMOND A. ANDERSON v. FEDERAL TRADE COMMISSION et al.*

No. 78-C-286. F.T.C. Docket No. 8934.

(United States District Court, Northern District of Illinois, Eastern Division, January 26, 1978)

On a petition from the subject of a California State arrest warrant for a stay of F.T.C. proceedings pending outcome of extradition appeal, or a transfer of proceeding to other than a California forum, court, in dismissing the action, held that the time and place of F.T.C. hearing, long set and regularly noticed, had not been motivated by any scheme to facilitate petitioner's arrest; and that no justifiable controversy ripe for resolution had been presented.

Lawrence C. Rubin and *James S. Barber*, of *Arvey, Hodes, Costello & Burman*, Chicago, Ill., for plaintiffs.

Before McGARR, *District Judge*.

MEMORANDUM OPINION AND ORDER

Plaintiff Anderson and his corporation are defendants in a Federal Trade Commission proceeding set for hearing in Los Angeles, California within a few days. The matter has been long set, many witnesses have been subpoenaed, and Anderson has been on notice of this hearing for several months.

Anderson is also the subject of a warrant issued by the State of California arising out of complaints filed by citizens of that state. He has resisted extradition on this charge, and an extradition order issued by the state court in Illinois is being appealed. Anderson is out on bond pending that appeal.

Plaintiff seeks an order from this court delaying the Federal Trade Commission proceeding until after resolution of the extradition appeal or, in the alternative, an order transferring the Federal Trade Commission hearing to a location outside of California.

The court finds that the Federal Trade Commission hearing was regularly noticed and that neither the time nor place were motivated by any plan to require his appearance in California to facilitate the execution of the state warrant. No governmental action has deliberately created the dilemma which faces the plaintiff.

There is no controversy before this court ripe for adjudication. If Anderson does not appear in California and the Federal Trade Commission proceeding goes forward without him to a final resolution, his statutory avenue of appeal lies in the Ninth Circuit Court of Ap-

*Not reported in Federal Reporter. Reported in Trade Reg. Rep. ¶ 61,872 at 73,660.

peals. If he elects to appear and is arrested, the problems he now faces are subject to adjudication and resolution by the California state court.

For the reason, therefore, that this court has before it no justifiable controversy ripe for resolution, the complaint of Raymond A. Anderson is dismissed.

FEDERAL TRADE COMMISSION v. UNITED STATES BORAX & CHEMICAL CORP.*

Misc. No. 78-0009. F.T.C. File No. 99-387.

(United States District Court, District of Columbia, February 17, 1978)

In granting F.T.C.'s petition for enforcement of its investigative subpoena issued to a chemical firm that was three months late in complying, court held that the agency was empowered to subpoena documents relating to its inquiry into the production and distribution of boric acid. Subpoena's broad definition of "document" as the original or a "true, correct and complete copy" was to permit party to submit copies and thus prevent any serious business disruption that might ensue from forced production of original documents. Respondent's deletion of portions of subpoenaed material constituted a challenge to the breadth of the subpoena which should have been raised before the Commission rather than the court, and firm's editing efforts probably contributed to its tardiness in compliance. Furthermore, since court's role in subpoena enforcement actions is a strictly limited one, respondent's objection that certain documents contained information irrelevant to F.T.C.'s inquiry could not change outcome of the proceeding.

Mark W. Haase, Washington, D.C., for petitioner.
Richard C. Warmer, Washington, D.C., for respondent.

Before PRATT, *District Judge.*

ORDER

The Federal Trade Commission has petitioned this Court for an Order enforcing a subpoena duces tecum, issued to respondent on September 16, 1977. Respondent is now three months late in meeting the subpoena, and has deleted portions of subpoenaed documents which it claims are irrelevant to petitioner's administrative inquiry.

Our role in the enforcement of an administrative subpoena is a strictly limited one. *F.T.C.* v. *Texaco,* 555 F. 2d 862, 871-72 (D.C. Cir.) (en banc), cert. denied, 431 U.S. 974 (1977). Respondent's objection that certain documents contain information irrelevant to the administrative inquiry cannot alter the outcome of this proceeding. The subpoena seeks "documents" related to boric acid production and distribution and defined "document" as "the original or a true, correct and complete copy" of relevant material. See FTC Petition, Exhibit 2, Definitions (Part (1)). Respondent's attempt to delete portions of documents properly within the scope of the subpoena constitutes a challenge to the breadth of that subpoena, a challenge

*Not reported in Fed. Rep. Reported in Trade Reg. Rep. ¶ 61,938 at 73,986 (1978-1 Trade Cases).

which should have been advanced before the Commission rather than before this Court. See 16 C.F.R. § 2.7(b) (motion to limit or quash subpoena shall be filed with Commission within 10 days after service of subpoena); *United States* v. *Morton Salt,* 338 U.S 632, 653 (1950) (reasonable efforts before Commission to secure limitation of order seeking information should precede invocation of judicial assistance).

It is this Court's opinion that the Commission has the power to subpoena originals,[1] and that the broad definition of "document" enables persons such as respondent to produce copies and avoid serious disruptions of their businesses which might be occasioned by forced production of originals. We do not believe that respondent may take further advantage of this provision. Furthermore, we suspect that respondent's tardiness in complying with the subpoena is due at least in part to its efforts in editing the subpoenaed documents.

For these reasons, it is by the Court this 17th day of February, 1978,

Ordered, that respondent shall appear before a duly designated representative of petitioner at a time and place in the District of Columbia, to be designated by petitioner upon not less than fourteen (14) days' notice, and then and there to testify and produce documents in complete and unexpurgated form in accordance with a Federal Trade Commission subpoena issued to respondent September 16, 1977. Failure to comply with the terms and conditions of this Order shall constitute a contempt of this Court.

[1] *See* 16 C.F.R. § 3.34(b)(2) (subpoena may provide for the inspection and copying of documents which constitute *or contain* evidence relevant to subject matter involved, in adjudicatory administrative context) (emphasis added).

GROLIER, INC., et al. v. FEDERAL TRADE COMMISSION et al.*

Civ. A. No. 76-1559. F.T.C. Docket No. 8879.

(United States District Court, District of Columbia, March 10, 1978)

In granting F.T.C.'s renewed motion for summary judgment in FOIA action seeking access to Commission documents, court held that, except for four factual, segregable sentences that must be released to plaintiff, all documents withheld in whole or part by the Commission are intra-agency memoranda reflecting the agency's deliberative processes, exempt from FOIA disclosure.

Walter G. Birkel, Jr., Samuel H. Seymour, Earl C. Dudley, Jr., and *Robert A. Seefried,* Washington, D.C., for plaintiffs.
Karen I. Ward, Washington, D.C., for defendants.

Before FLANNERY, *District Judge.*

MEMORANDUM AND JUDGMENT

This matter comes before the court on defendants' renewed motion for summary judgment. When this case was first before this court on defendants' motion for summary judgment, this court, in its order of July 22, 1977, found that defendants' records search had been inadequate, and the court, therefore, refused to reach the merits of this case. Since that time, defendants have conducted an additional search of its non-public rulemaking files and have determined that there are no records therein contained which are responsive to plaintiffs' F.O.I.A. request. Defendants have, therefore, renewed their motion for summary judgment on the grounds that their documents search is now complete, and that the documents withheld in whole or in part are exempted from disclosure under exemption (b)(5) since they are intra-agency memoranda reflecting the agency's deliberative processes. Defendants have also stated that they have released all reasonable segregable factual material from these documents. The plaintiffs oppose this motion on the grounds that the exemption 5 claim has been inadequately supported by the agency, and that the agency's supplemental records search is not sufficient.

At this time, this case presents two situations for resolution. When defendants were ordered to conduct their additional documents search, the original indexing and justification statement had been

*Not reported in Federal Reporter. Reported in ¶ 62,084 at 74,719 (1978-1 Trade Cases). For case before the Commission, see 91 F.T.C. 315.

finished for several months. The adequacy of the original search is no longer challenged. Therefore, this court's first task is to assess the adequacy of the original indexing and justification statement as a basis for summary judgment. The court's second task is to measure the adequacy of the additional search in which no new responsive documents were found.

I. *The Documents in Issue*

There are presently forty-two documents which defendants have refused to release in whole or in part to plaintiffs. These documents are divided into five different categories. Defendants claim exemption 5 for all of these documents. Plaintiffs challenge the sufficiency of the justification advanced for this nondisclosure. Such challenges to the sufficiency of an agency's indexing and justification of withheld documents has become an increasingly troublesome area for district court. The Circuit Court in *Vaughn v. Rosen*, 484 F.2d 820 (D.C.Cir. 1973) (hereinafter *Vaughn I*) indicated that the government must give a justification statement which is "sufficiently detailed" and yet "would not have to contain factual descriptions that if made public would compromise the secret nature of the information, but could ordinarily be composed without excessive reference to the language of the document." *Id.* at 826-27. It is clear, as the Circuit Court indicated in *Vaughn II*, *Vaughn v. Rosen*, 523 F.2d 1136 (D.C.Cir. 1975), that the mere assertion that a document or a portion thereof is exempt is not sufficient for these purposes. *Id.* at 1144-45. Other than that, however, the determination of the sufficiency of the so-called *Vaughn* statement must be based on a case-by-case examination of the facts. Although the court is under no compulsion to conduct an *in camera* examination of the documents, *Vaughn I*, *supra*, 484 F.2d 825, the court may examine a representative sample of the documents in question to test the validity of the agency's description. *Ash Grove Cement Company v. FTC*, 511 F.2d 817 (D.C.Cir. 1975). Indeed, in this case, this court, by its order dated January 13, 1978, requested that defendants submit nine documents for *in camera* inspection. Upon review of these documents and in consideration of the defendants' justification statement and plaintiffs' opposition thereto, this court may proceed to assess the status of the documents in each of the categories in issue.

A. Category A contains memoranda to the Commission from the Commission Staff, and have been withheld in whole or in part. (Documents 1A-6A). Of this total of thirty-seven pages, all of the information has been released except ten pages, eight paragraphs and eight sentences. The F.T.C. states that each of these deletions

reflects an expression of a recommendation, opinion or analysis on the part of a staff member or attorney regarding the underlying regulatory action against the plaintiffs. Substantial portions of Documents 1A through 5A have already been released, and the F.T.C. has stated that only the actual recommendations and opinions have been deleted from these documents. While it is true that the assertion that a document contains an opinion or recommendation is not a justification to withhold the entire document, *Bodner v. F.T.C.*, CCH 1975-1 TRADE CASES ¶ 60,118 at 56,269, here such assertions are made when substantial portions of the documents have already been released. The plaintiffs, therefore, know the background against which the recommendations or opinions are being made. The only thing plaintiffs do not know is the precise content of the recommendation or opinion. In view of the precise nature of the defendants' justifications, this court is of the opinion that the withheld portions of Documents 1A through 5A are properly exempt from disclosure.

As for Document 6A, the court has examined this document *in camera*. The F.T.C. had refused to release this document because it supposedly summarized actions taken, evidence received and future actions planned in the underlying F.T.C. proceeding against the plaintiffs. It is, of course, well established that if a document contains reasonably segregable portions which summarize actions already taken, those portions must be released. *E.P.A. v. Mink*, 93 S.Ct. 827, 836 (1973). Document 6A is a letter which refers at several points to the fact that Grolier had produced certain evidence pursuant to an F.T.C. order. However, the rest of the letter summarizes the plans for collecting and analyzing this and other information. As such, the four sentences referring to Grolier's production of evidence should be released, and these sentences are: the first sentence in the first paragraph on the first page; the last two sentences in the second paragraph on the first page; and the third sentence in the third paragraph of the first page. The remainder of Document 6A is properly exempt under exemption 5.

B. Category B contains fourteen documents, all withheld in full. According to defendants' *Vaughn* statement, Documents 1B, 2B, 6B, 8B, and 9B all are requests of certain of the commissioners to place certain matters on the agenda for certain days. Similarly, Document 14B is a request for an informal hearing on a matter involving the plaintiff Grolier. Given the limited scope and length of each of these documents, this court is satisfied that they have been described in as thorough and complete manner as possible. These documents clearly represent stages of the deliberative process at which government employees should be afforded protection since they represent decisions to go forward with further administrative consideration.

N.L.R.B. v. Sears, Roebuck & Co., 95 S.Ct. 1504, 1516-17 (1975). As such, these documents are properly exempt from disclosure.

The court has examined the rest of the documents in this category *in camera*. Documents 3B, 4B, and 7B are all motions by various commissioners that certain matters relating to plaintiffs in this case be taken up as non-agenda matters. For the same reasons as stated for the preceding documents, these are exempt from disclosure. Document 5B is a memorandum granting one of the commissioner's motion for consideration of the Grolier matter as a non-agenda item. Since this document represents the advancement of administrative consideration of this matter, and since it contains no "secret law," see *N.L.R.B v. Sears, Roebuck & Co., supra*, 95 S.Ct. at 1518, this document is also exempt from disclosure. Documents 10B, 11B and 12B are memoranda from various commissioners commenting on certain recommendations from various offices and bureaus within the F.T.C. These memoranda reflect the personal assessments of the commissioners of certain investigations and proposed actions. They are all predecisional internal memoranda, and as such should not be disclosed. Finally, Document 13B is a memorandum from one commissioner covering a wide range of topics. The commissioner recommends a variety of courses of action for numerous cases. Once again, this memorandum does not represent a final decision, and since it is an integral part of the deliberative process, this court will not compel its disclosure.

C. Category C contains six documents, each one page in length and each withheld in full. Each document represents the assignment of certain matters involved in the F.T.C. proceeding against the plaintiffs to a specific commissioner for further study. Defendants' description of these documents is sufficient to inform the court that these documents also represent a further phase in the deliberative process. The Secretary's assignment of certain matters to individual commissioners elevates those matters from a process of mere preliminary study to one of intensive consideration and analysis. Such assignments, indicating as they do the need for further study, are not final decisions as a decision of non-referral might be. See *N.L.R.B. v. Sears, Roebuck & Co., supra*, 95 S.Ct. at 1518-20. Exposing such assignment sheets to public scrutiny would seem to be the sort of undue interference with the deliberative process of executive agencies which Congress sought to prevent. *Id.* at 1516-17. Therefore, these documents are exempt from disclosure.

D. Category D contains fourteen "Blue Minutes" comprising sixteen pages. "Blue Minutes" are directives from commissioners to their staff members to prepare or revise certain memoranda on various points of law. In *Ash Grove Cement Co. v. F.T.C.*, 511 F.2d 815, 816 (D.C.Cir. 1975), the court upheld the district court's finding

that such "Blue Minutes" are exempt from disclosure under exemption 5. In light of the nature of these directives, and because they have been held as exempt in other circumstances, defendants must prevail on their claim of exemption in this case.

E. Category E contains two documents, one page each, prepared by staff attorneys of the F.T.C. Document 1E reflects an attorney's recollections of a meeting he had with an officer of Grolier and an attorney for Grolier. Document 2E reflects an attorney's recollections of a meeting with an attorney for Grolier and of a phone conversation with another attorney representing Grolier. Both of these documents have been withheld in their entirety.

Congress intended that exemption 5 would exempt from disclosure all material that might otherwise be exempt via the attorney work product rule. *N.L.R.B. v. Sears, Roebuck & Co., supra,* 95 S.Ct. at 1518. According to the Supreme Court the work product rule covers the personal recollections of attorneys of meetings and conversations with other parties since such accounts are not purely factual transcriptions but are colored by the attorney's perceptions. *Hickman v. Taylor,* 329 U.S. 495, 510, 67 S.Ct. 385, 393 (1947). In a case similar to the one at hand in which a party had made an F.O.I.A. request for documents written by F.T.C. attorneys recounting their recollections of meetings with various parties, the court held that such documents were totally exempt. *United States v. J.B. Williams Company, Inc.,* 402 F.Supp. 796, 801 (S.D.N.Y. 1975). The court in that case stated, "The crucial fact is that defendant's agents were present." *Id.* The same situation presents itself here. The memoranda reflect conversations with plaintiffs' agents. The purely factual content of the memoranda is therefore already in plaintiffs' possession due to participation in those conversations. All that plaintiffs do not have are the attorneys' personal perceptions, and those are clearly exempt. Therefore, disclosure of these documents will not be compelled.

In summary, therefore, all of the documents plaintiffs have requested are properly exempt under exemption 5 of the F.O.I.A., although defendants must release the designated sentences from Document 6A. On that basis, summary judgment for defendants as to the existing documents is proper.

II. *Sufficiency of F.T.C.'s Supplementary Records Search*

As indicated earlier, the F.T.C. was ordered to make a supplemental search of its non-public rulemaking files to see if there were any other documents responsive to plaintiffs' request. In an affidavit submitted to the court, the Secretary of the Commission indicated that such a search was undertaken, but that no responsive documents

were found. Plaintiffs challenge the sufficiency of this search and request that this court allow them to engage in limited discovery regarding the adequacy of the search. This court had allowed plaintiffs to engage in such limited discovery regarding the original documents search. However, the original search was of the entire recordkeeping system of the F.T.C., and plaintiffs could plausibly argue that some background material on this system was necessary for them to evaluate the adequacy of the search. At present, however, the circumstances are different. The additional search was of one, discrete records system, and was intended to supplement the original search. Plaintiff's argument that defendants' finding of nonresponsive documents is conclusory also merits little attention. Defendants were required by this court to do one thing, and the fact that the search failed to turn up any further information is not evidence of bad faith on the part of the agency. Plaintiffs have received a large amount of information in this case, both through discovery and through the agency's releasing of documents. Plaintiffs have failed to show any reason for prolonging this matter any further especially when defendants appear to have obeyed this court's orders. Therefore, this court is of the opinion that plaintiffs are entitled to no further discovery on the question of the adequacy of the documents searches.

For these reasons, and upon consideration of defendants' motion, the memoranda and affidavits submitted in support thereof and in opposition thereto, and oral argument thereon, it is, by this court, this 10th day of March, 1978,

Ordered, Adjudged and Decreed that defendants shall release to plaintiffs the following parts of Document 6A as described above: the first sentence in the first paragraph of the first page; the last two sentences in the second paragraph of the first page; and the third sentence in the third paragraph of the first page; and it is further

Ordered, Adjudged and Decreed that defendants' motion for summary judgment be, and the same hereby is, granted; and it is further

Ordered, Adjudged and Decreed that judgment be, and hereby is, entered for the defendants in this matter.

FEDERAL TRADE COMMISSION *v.* GLENN W. TURNER ENTERPRISES, INC.*

No. 77-67-Orl-Civ-R. F.T.C. Docket No. 8888.

(United States District Court, Middle District of Florida, Orlando Division, March 15, 1978)

1. DISCONTINUANCE OF CONDUCT CITED IN F.T.C. ORDER DOES NOT BAR CONSUMER REDRESS UNDER THE F.T.C. IMPROVEMENT ACT.

The Federal Trade Commission could obtain consumer redress under provisions of Federal Trade Commission Improvement Act for the act or practice which was the specific subject of the cease and desist order, even though the act or practice may not have been repeated or continued in violation of the order.

2. IF RESPONDENT HAS RECEIVED PROPER NOTIFICATION THAT CONSUMER REDRESS MAY BE SOUGHT, AND CEASE AND DESIST ORDER POSTDATES EFFECTIVE DATE OF THE F.T.C. IMPROVEMENT ACT (JANUARY 4, 1975), CONSUMER REDRESS IS PERMITTED FOR PRIOR MISCONDUCT.

[1114] Consumer redress may be sought under authorizing provision of Federal Trade Commission Improvement Act for conduct which occurred before passage of authorizing section, if the cease and desist order is entered after January 4, 1975 and the person against whom the order issued was notified in complaint or in notice or order attached thereto that consumer redress may be sought.

Defendant filed motion to dismiss action by Federal Trade Commission seeking consumer redress. The District Court, Reed, J., held that: (1) the Commission could obtain consumer redress under provisions of Federal Trade Commission Improvement Act for the act or practice which was the specific subject of the cease and desist order, even though the act or practice may not have been repeated or continued in violation of the order, and (2) consumer redress may be sought under authorizing provision of Federal Trade Commission Improvement Act for conduct which occurred before passage of authorizing section, if the cease and desist order is entered after January 4, 1975 and the person against whom the order issued was notified in complaint or in notice or order attached thereto that consumer redress may be sought.

Motion to dismiss denied.

(Syllabus, with substituted captions, taken from 446 F.Supp. 1113)

Margery W. Smith, Acting Director, Bureau of Consumer Protection, *Richard C. Foster,* Asst. Director for Marketing Practices, Quentin P. McColgin, Atty., Federal Trade Commission, Washington, D.C., for plaintiff.

Philip Tatich of *Nichols & Tatich, P.A.,* Orlando, Fla., for defendant.

* Reported in 446 F.Supp. 113 (1978); *Aff'd per curiam,* D.C. Cir., July 5, 1978. For case before the Commission, see *In the Matter of Koscot Interplanetary, Inc., et al,* 86 F.T.C. 1106; *modified,* 87 F.T.C. 75; *clarified* 87 F.T.C. 419.

MEMORANDUM OF DECISION

REED, *District Judge.*

The defendant filed a Motion to Dismiss on 23 March 1977. The primary grounds urged in support of the motion are: (1) the action was not commenced within the period provided by the statute of limitations; (2) consumer redress authorized by Section 206(a) of the Federal Trade Commission Improvement Act extends only to injury from conduct which follows and is violative of a final cease and desist order; and (3) consumer redress cannot be had under the Act for conduct antedating the Act. Hereafter, references to Section 206(a) of the Federal Trade Commission Improvement Act will be to Section 19 and the subsections thereof which were added to the Federal Trade Commission Act by Section 206(a).

With regard to the statute of limitations issue, its resolution turns on when service of the cease and desist order was effected. This question depends on various facts, such as how the service was made, when and where it was made, and whether or not the place where the order was served was the residence of an executive officer of the defendant or the principal place of business of the defendant. The legal aspects of the issue will be governed by Commission Rule 4.4 as it existed at the time the cease and desist order was issued. Because the statute of limitations problem involves issues of fact, it is not appropriate for decision on the basis of the motion to dismiss. The defendant may plead the statute of limitations as an affirmative defense on which it will have the burden of proof.

The facts which control the issue may conceivably be stipulated by the parties. If the parties are not able to stipulate, it would appear appropriate for the court to hold an evidentiary hearing and decide the statute of limitations issue prior to the trial on the merits. The parties, therefore, will advise the court in writing within twenty days from the date of this decision whether or not they are able to stipulate to all pertinent facts relating to the issue. If not, the parties will advise the court within the same period the length of time which they expect will be required to try the statute of limitations defense.

The second ground argued in support of the motion is that consumer redress may be had by the Commission under Section 19(a)(2) only for a deceptive act or practice committed after the entry of a final cease and desist order. Section 19(a)(2) provides:

> If any . . . corporation *engages* in any unfair or deceptive act or practice . . . with respect to which the Commission *has issued* a final cease and desist order which is applicable to such . . . corporation, then the Commission may commence a civil action against such . . . corporation . . . (Emphasis added).

Literally read, the quoted language supports defendant's conclusion. The structure of Section 19(d), however, suggests that Congress intended the redress to cover not only the deceptive acts and practices which preceded the cease and desist order and became its specific subject, but also similar acts and practices which followed and were [1115] in violation of it. As to the latter class, Section 19(d) appears to provide a three-year period of limitations. As to the former, the period of limitations would commence to run upon the finality of the cease and desist order and would extend for a period of one year thereafter.

The defendant's construction of Section 19(a)(2) would produce an anomaly in the operation of Section 19(d). If the defendant is correct, no consumer redress would be available under Section 19(a)(2) for a deceptive or unfair act or practice, if its perpetrator simply refrains from similar conduct for one year after finality of the cease and desist order. Thereafter the perpetrator could resume the same conduct with complete immunity from a Section 19(a)(2) claim.

Furthermore, the defendant's construction of Section 19(a)(2) would create a conflict with Section 19(b) which provides:

> The court in an action under subsection (a) of this section shall have jurisdiction to grant such relief as the court finds necessary to redress injury to consumers . . . resulting from . . . *the unfair or deceptive act or practice* . . . (Emphasis added).

The quoted language refers back to the act or practice described in Section 19(a)(2) which is the specific act or practice "with respect to which the Commission has issued a final cease and desist order . . .".

[1] While statutes are normally to be construed literally, such a construction is not warranted where it creates a conflict within the statute or a patently unreasonable result. For this reason, the court construes Section 19(a)(2) as authorizing consumer redress for the act or practice which was the specific subject of the cease and desist order, even though the act or practice may not have been repeated or continued in violation of the order.

[2] The final ground urged by the defendant which requires discussion is whether or not consumer redress may be allowed for conduct which occurred before the passage of Section 19. This contention is resolved by Section 206(b) of the Federal Trade Commission Improvement Act. Section 206(b) provides that consumer redress may be sought under Section 19(a)(2), if the cease and desist order is entered after 4 January 1975 and the person against whom the order issued was notified in the complaint or in the notice or order attached thereto that "consumer redress may be sought".

Paragraph 4 of the complaint filed herein adequately alleges that the notice required by Section 206(b) was given in the preamble to the notice order attached to the administrative complaint. The allega-

tions in paragraph 4 are sufficient as a matter of pleading to bring the cause within Section 206(b).

For the foregoing reasons, the motion to dismiss will be denied.

FEDERAL TRADE COMMISSION v. ATIDA H. KARR et al.*

Misc. No. 78-10. F.T.C. File No. 99-388.

(United States District Court, District of Columbia, March 16, 1978)

In a subpoena proceeding instituted in the course of an F.T.C. investigation of possible unfair or deceptive advertising of a skin-care preparation, court, in rejecting respondents' request for an order protecting preparation's formula from disclosure, held that respondents' efforts to have the formula declared a trade secret and preclude disclosure in future F.T.C. and FOIA proceedings were clearly premature; and respondents' desire to have outside consultants proclaimed F.T.C. employees was founded on the unsubstantiated assumption that insufficient incentives for confidentiality would be provided by signed agreements and affidavits which bind consultants to non-disclosure.

Before PRATT, *District Judge.*

MEMORANDUM

This is a subpoena proceeding instituted by the Federal Trade Commission in the course of an administrative investigation of possible unfair or deceptive advertising of respondents' product Acne-Statin, a skin-care preparation. Federal Trade Commission Act §§ 5, 12, 15 U.S.C. §§ 45, 52. Our jurisdiction rests on section 9 of the Federal Trade Commission Act, 15 U.S.C. § 49.

The issues here turn on Specification 22 of a subpoena *duces tecum* issued to Atida H. Karr, M.D. November 1, 1977, which directs her to produce documents setting forth the quantitative formula of Acne-Statin.** Respondents have resisted compliance with Specification 22 on the ground that the Commission and its staff have accorded insufficiently strong guarantees that the confidentiality of the formula will be preserved.

By letter of February 1, 1978, the Commission notified respondents that, subject to enumerated exceptions, it would "not disclose the formula to any person outside the employ of the Federal Trade Commission, without first giving Karr Preventative Medical Products, Inc. ten days' notice of its intention to do so." The letter indicates that the 10-day notice requirement does not apply to

(i) Commission responses to either compulsory judicial process or to official requests from Congressional committees and subcommittees;

*Not reported in Federal Reporter. Reported in Trade Reg. Rep. ¶ 61,932 at 73,936 (1978-1 Trade Cases).

**No argument has been advanced, and none appears to the Court, to suggest that the subpoena in question is other than within the Commission's authority and directed at obtaining reasonably relevant information at no undue burden to respondents. *United States* v. *Morton Salt Co.*, 338 U.S. 632, 652 (1950).

(ii) disclosure of the formula to outside consultants retained by the Commission, provided the consultants have agreed not to disclose it to unauthorized persons, and

(iii) disclosure of information which either has entered the public domain from a source other than the Commission or its employees, or was disclosed to the Commission by a source other than respondent Karr Preventative Medical Products, Inc.

In addition to these Commission assurances, members of the Commission staff have agreed to keep the formula locked away when it is not actually in use, to limit access to the formula, and to give respondents 10 days' notice of the staff's intention to offer the formula into evidence. Affidavit of Mark Heller ¶ 7 (Feb. 7, 1978). In addition, the staff would require outside consultants to whom the formula is disclosed to sign affidavits, in addition to the non-disclosure agreements the consultants already have signed, binding them to a protective agreement. *Id.*

Respondents wish the formula declared a "trade secret" under section 6(f) of the Federal Trade Commission Act, 15 U.S.C. § 46(f), and the outside consultants declared "employees" of the Commission for purposes of statutes prohibiting disclosure of trade secrets by Commission employees, *id.* § 10, 15 U.S.C. § 50; 18 U.S.C. § 1905. In addition, respondents desire more stringent internal safeguards on the confidentiality of the formula. Finally, they request that the formula documents either be destroyed at the close of the proceedings here or thereafter be kept locked in a safe, with access thereto limited to a single FTC official.

Our review here is limited. *FCC* v. *Schreiber,* 381 U.S. 279, 290-91 (1965); *FTC* v. *Anderson,* 1977-2 TRADE CASES ¶ 61,778 at 73,219 (D.D.C. Dec. 13, 1977), application for protective order pending appeal denied, No. 78-1032 (D.C. Cir. Feb. 2, 1978) (per curiam); *FTC* v. *United States Pipe & Foundry Co.,* 304 F.Supp. 1254, 1260 (D.D.C. 1969). Respondents' efforts to have the formula declared a "trade secret" and to preclude disclosure in future proceedings both before the Commission and under the Freedom of Information Act are clearly premature, in being founded, in the first instance, on an insufficiently developed record, and in the second, on speculative threats of disclosure. See *FTC* v. *Anderson, supra* at 73,218. Their desire to have outside consultants declared employees of the Commission rests on the unsubstantiated assumption that the non-disclosure agreements and affidavits signed and to be signed by those consultants afford insufficient incentives to non-disclosure. Finally, the internal measures which respondents urge upon the Commission seem largely cumulative in light of the staff's assurances of similar protections. For these reasons, we decline to engraft onto the assurances tendered by Commission and staff the doubtfully

necessary protections espoused by respondents. An Order consistent with the foregoing has been entered this day.

FEDERAL TRADE COMMISSION *v.* GIBSON PRODUCTS OF SAN ANTONIO, INC. et al.*

No. 76-1818. F.T.C. Docket No. 9016.

(United States Court of Appeals, Fifth Circuit, March 17, 1979)

1. COMPLIANCE WITH SUBPOENA DURING PENDENCY OF APPEAL AND FTC'S DECISION TO SEEK NO FURTHER DISCLOSURE DID NOT RENDER APPEAL MOOT, SINCE COURT COULD RULE AGAINST THE COMMISSION AND REQUIRE THE RETURN OF SUBPOENAED DATA.

   Appeal from district court order enforcing Federal Trade Commission subpoenas duces tecum in connection with complaint filed against founder of retail department store chain was not rendered moot by fact that, during pendency of appeal subpoenas had been complied with and FTC had indicated it would not pursue further disclosure, since, if case were decided [901] against FTC, relief would be available by order requiring FTC to return subpoenaed documents and to forbid use of subpoenaed material in adjudicatory hearing.

2. IF FTC VIOLATED ITS OWN RULES OF DISCOVERY, FEDERAL COURT WOULD NOT ENFORCE ITS SUBPOENAS.

   Federal court will not aid in enforcing subpoena of Federal Trade Commission if Commission did not adhere to its rules governing use of such discovery tools since, when Commission publishes rules, it is bound by them.

3. COURTS GENERALLY APPLY STRICTER STANDARDS OF RELEVANCE FOR FTC'S ADJUDICATIVE SUBPOENAS THAN FOR ITS INVESTIGATIVE SUBPOENAS.

   In general, courts apply more lenient standards of relevance for investigative subpoenas issued by Federal Trade Commission than for adjudicative subpoenas.

4. WHERE ONLY FOUR SPECIFIC ITEMS WERE REQUESTED AND INFORMATION WAS NOT OTHERWISE AVAILABLE, FTC SUBPOENAS WERE REASONABLE IN SCOPE.

   Investigative subpoenas duces tecum issued by Federal Trade Commission after filing complaint against founder of chain of retail department stores and 11 other individual and corporate defendants, directing five local retailers who were not named as defendants to produce for inspection minutes of shareholder meetings and board of directors meeting, names and addresses of shareholders since date of incorporation to present, and records on transfer of shares since date of incorporation to present, were reasonable in scope, since subpoenas requested only four specific items from each corporation and FTC explained that information was unavailable from any other source.

5. REVIEWING COURT NEED ONLY SHOW THAT MATERIAL SOUGHT IS "REASONABLY RELEVANT" TO SUPPORT DISTRICT COURT'S SUBPOENA ENFORCEMENT ORDER.

   All that reviewing court requires in determining whether showing of relevance of investigative subpoena duces tecum issued by Federal Trade Com-

*Reported in 569 F.2d 900 (1978). *Reh. denied,* May 22, 1978. For case before the Commission, see 87 F.T.C. 1389.

mission is sufficient to support district court order enforcing subpoena is that material sought be "reasonably relevant."

6. SUBPOENAS WERE PROPERLY ENFORCED SINCE MATERIAL SOUGHT WAS REQUIRED TO DETERMINE DIRECTION AND CONTROL OF STORES, AND TO SHOW THAT RESPONDENTS WERE NOW OFFICERS OR SHAREHOLDERS OF STORES.

Subpoenas duces tecum issued by Federal Trade Commission in connection with complaint against founder of retail department store chain and 11 other corporate and individual defendants, directing five local retailers not named as defendants to produce information which FTC complaint counsel stated was needed to determine direction and control of stores and to demonstrate that defendants in complaint were now officers or shareholders of stores, sought material which was "reasonably relevant" to complaint and were properly enforced.

7. WHERE DEFENDANTS HAD ALLEGEDLY INDUCED DISCRIMINATORY PAYMENTS "PARTICULARLY SINCE 1959," ALJ DID NOT ABUSE DISCRETION IN APPROVING F.T.C.'S REQUEST FOR DEPOSITION.

Administrative law judge, in proceedings on Federal Trade Commission complaint against founder of retail department store chain and 11 other individual and corporate defendants who allegedly induced discriminatory allowances from suppliers, did not abuse discretion in approving FTC's request for deposition based on what appeared necesary in order to learn acts pertinent to argument in case.

8. BASED ON WHAT APPEARED NECESSARY TO ELICIT RELEVANT FACTS, ALJ DID NOT ABUSE DISCRETION IN APPROVING FTC'S REQUEST FOR DEPOSITION.

Administrative law judge, in proceedings on Federal Trade Commission complaint against founder of retail department store chain and 11 other individual and corporate defendants who allegedly induced discriminatory allowances from suppliers, did not abuse discretion in approving FTC's request for deposition based on what appeared necessary in order to learn acts pertinent to argument in case.

9. LIMITING LANGUAGE IN FTC'S RULE ON DEPOSITIONS DOES NOT APPLY TO DISCOVERY DEPOSITIONS.

[902] Limiting language in Federal Trade Commission rule stating that "deposition should not be ordered to obtain evidence from a person relating to matters with regard to which he is expected to testify at the hearing, or to obtain evidence which there is reason to believe can be presented at a hearing without the need for a deposition" pertains only to preserving evidence, not to discovery depositions.

10. ALJ BEARS BURDEN OF PREVENTING DISCOVERY ABUSE.

Burden of preventing discovery abuse under Federal Trade Commission rules is on administrative law judge not on any limitation in rule prohibiting depositions of witnesses.

11. FTC NEED NOT SHOW ABSENCE OF LESS BURDENSOME MEANS TO ACQUIRE INFORMATION WHERE IT HAD EXPLAINED THAT VOLUNTARY COMPLIANCE HAD FAILED AND SUBPOENAED DATA WAS RELEVANT, REASONABLE AND NECESSARY.

Where Federal Trade Commission explained that subpoenas duces tecum issued by it directing certain local retailers to provide four items relating to ownership of their stores were relevant, reasonable, necessary and that volun-

tary compliance had failed, there was no need for Commission to show absence of a less burdensome means to obtain such information.

12. FTC ORDERS CAN PROHIBIT ABANDONED PRACTICES.

Federal Trade Commission can issue orders forbidding practices that have been abandoned.

13. REASONABLY RELEVANT MATERIAL CONCERNING EITHER CURRENT OR PAST CONDUCT CAN BE DISCOVERED BY SUBPOENA.

As long as material requested by subpoenas duces tecum issued by Federal Trade Commission is reasonably relevant to alleged violations, it can be discovered by subpoena, regardless of whether it concerns current or past conduct.

14. SINCE PUBLIC DISCLOSURE COULD BE RESTRICTED BY ALJ OR THE COMMISSION, SUBPOENAS REQUESTING CONFIDENTIAL INFORMATION WERE NOT OVERLY BROAD.

Subpoenas duces tecum issued by Federal Trade Commission were not overly broad simply because requests may have included confidential information, where nothing prevented administrative law judge or Commission from restricting public disclosure of such information as law allowed.

Appeal was taken from an order of the United States District Court for the Northern District of Texas, at Dallas, Robert M. Hill, J., enforcing Federal Trade Commission subpoenas duces tecum in connection with a complaint charging the founder of a retail department store chain and certain other individual and corporate defendants with inducing discriminatory allowances from suppliers and with boycotting suppliers who did not make such payments. The Court of Appeals, Brown, Chief Judge, held that: (1) the material requested by the subpoenas was reasonable in scope and was relevant; (2) the FTC was not required to show that the material could not be obtained by "less burdensome means," and (3) the subpoenas were not overly broad simply because the requests may have included confidential information.

Affirmed.

(Syllabus, with substituted captions, taken from 569 F.2d 900)

Bardwell D. Odum, Robert E. Rader, Jr., Dallas, Tex., for defendants-appellants.

John T. Fischbach, F.T.C., *Gerald Harwood*, Asst. Gen. Counsel, *Mark W. Haase, Robert J. Lewis*, Gen. Counsel, *Gerald P. Norton*, Deputy Gen. Counsel, F.T.C., Washington, D.C., for plaintiff-appellee.

Appeal from the United States District Court for the Northern District of Texas.

Before BROWN, *Chief Judge*, GODBOLD, *Circuit Judge*, and MEHRTENS†, *District Judge*.

JOHN R. BROWN, *Chief Judge:*

†Honorable William O. Mehrtens, Senior District Judge of the Southern District of Florida, sitting by designation.

Five Gibson Products corporations[1] appeal the District Court's order enforcing Federal Trade Commission (FTC) subpoenas duces tecum. Despite cries of irrelevance, statutory abuse, and violations of the Commission's rules, we find the subpoenas relevant, within the bounds of the FTC Act, and free of any administrative rule defect. We affirm.

The Subpoena Arena

The Gibson corporations are part of a chain of over 500 retail department stores located predominantly in Texas, Oklahoma, Kansas, Colorado, and Arkansas. Under the name of "Gibson Discount Centers," **[903]** these five stores operate in San Antonio, Garland, Richardson, and Plano, Texas and in Shreveport, Louisiana.

In 1975, the FTC issued a complaint against H.R. Gibson, Sr., the founder of the chain, and eleven other individual and corporate respondents.[2] H.R. Gibson, Sr., individually and doing business as Gibson Products Company and The Gibson Trade Shows, *et al.*, No. 9016 (F.T.C., filed Aug. 25, 1975). The five local retailers in this case were not named as respondents.[3] The FTC aimed the complaint primarily at practices resulting from trade shows for wholesale distributors. Representatives from Gibson retailers would come to these shows to examine merchandise and to arrange for purchases. The Commission charges that H.R. Gibson, Sr., and others induced discriminatory allowances from suppliers to participate in these shows in violation of § 5 of the FTC Act, 15 U.S.C.A. § 45. If wholesale suppliers refused to pay, moreover, the Gibson retailers allegedly boycotted the nonparticipating sellers.

After the complaint was filed, FTC Counsel applied to an administrative law judge (ALJ) for the subpoenas duces tecum at issue in this case. In general, the complaint counsel seeks to discover whether the respondents control the retail outlets. Specifically, the subpoenas request that a representative of each local store produce for inspection (i) minutes of shareholder meetings, (ii) minutes of board of directors meetings, (iii) names and addresses of shareholders since the date of incorporation to present, and (iv) records on the transfer of shares since the date of incorporation to present.

The ALJ ordered compliance, but he modified the subpoenas to require documents from only 1970 to 1975. After the five corporations refused to obey, the FTC sought enforcement in Federal District

[1] The five corporations are referred to collectively in this opinion as "Gibson."

[2] The other respondents named in the complaint were Herbert R. Gibson, Jr., Gerald Gibson, Belva Gibson, Gibson's Inc., Gibson's Discount Center, Inc., Ideal Travel Agency, Inc., Gibson Warehouse, Inc., Gibson Products Co., Inc., Progressive Brokerage, Inc., Barshell, Inc., and Al Cohen & Associates, Inc.

[3] However, two individual respondents, H.R. Gibson, Jr., and Gerald P. Gibson, are president and vice-president, respectively, of all five retailers.

Court, 15 U.S.C.A. § 49. Following a hearing, the trial court upheld the entire request.

Mootness

[1] The threshold question is whether this case is moot. Following the District Court's as well as this Court's, denial of a stay pending appeal, a representative of Gibson provided the documents or summaries of the information as requested. Although Gibson has now substantially complied with these subpoenas and the FTC has indicated it will not pursue further proceedings,[4] we believe the controversy is still alive. If this case were decided in Gibson's favor, relief would be available by an order requiring the FTC to return the subpoenaed documents and to forbid use of the material in the adjudicatory hearing. *See Atlantic Richfield* v. *FTC*, 5 Cir., 1977, 546 F.2d 646, 650; *FTC* v. *Browning*, 1970, 140 U.S.App. D.C. 292, 296, 435 F.2d 96, 97 n.1.[5]

Gibson also argues that the trial court erred in refusing to grant a stay pending appeal. This question, however, is made moot by our decision on the merits of the subpoenas. *Cf. DeSimone* v. *Linford*, 5 Cir., 1974, 494 F.2d 1186 (appeal from denial of preliminary injunction pending administrative appeal was moot after completion of administrative appeal). [904]

Playing By The Rules

[2] Gibson's principal attack on the subpoenas is that the FTC violated its own discovery rules. This Court, of course, will not aid in enforcing a subpoena if the Commission did not adhere to its rules governing the use of such discovery tools. When the FTC publishes rules, the FTC is bound by them. *Pacific Molasses Co.* v. *FTC*, 5 Cir., 1966, 356 F.2d 386, 389-90.[6]

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[4] At a deposition on June 4, 1976, Herbert R. Gibson, Jr., president of the five appellants, complied with specifications three and four of the subpoenas, but he submitted only handwritten summaries in response to requests one and two. The FTC conceded in its brief it is satisfied with these documents and will not press for further disclosure. Brief of Appellee at 5 n. 3.

[5] Although in *Baldridge* v. *United States*, 5 Cir., 1969, 406 F.2d 526, we held an appeal moot following compliance with an Internal Revenue Summons to produce work papers, this case is not controlling here because it was not clear in *Baldridge* that further relief was available.

[6] The parties have provided the Court with considerable material on the evolution of the FTC rules for discovery in adjudicative hearings. Although discovery in administrative hearings has traditionally been limited, the current FTC rules, passed in 1967, are more liberal than previous rules. In 1963, for example, the FTC rules required a showing that a deposition would "constitute or contain evidence." FTC Rule § 3.10, 28 Fed.Reg. 7088 (1963). When the Commission changed the rules in 1967, former FTC Chairman Kintner hailed it as recognition by the Commission "[f]or the first time . . . that depositions may be taken for discovery purposes." Kintner, *Recent Changes in Federal Trade Commission Discovery Practices*, 37 ABA Antitrust L.J. 238, 239 (1968). FTC Rules similar to the Federal Rules of Civil Procedure were circulated for comment in 1975, 40 Fed.Reg. 15239-45 (Apr. 4, 1975), but have not yet been adopted. For a review of FTC discovery, see Bennett, *Post-Complaint Discovery in Administrative Proceedings: The FTC as a Case Study*, 1975 Duke L.J. 329.

Gibson argues, in particular, that the complaint counsel did not adequately make the showing required under 16 C.F.R. § 3.33 and § 3.34 before the ALJ, or indeed, failed to make any showing at all. Unlike the Federal Rules of Civil Procedure, which provide for judicial intervention only when a party resists discovery,[7] the FTC Rules stipulate that a party seeking discovery must justify every deposition and subpoena before an ALJ. This requirement, in theory, allows the ALJ to control dilatory tactics by parties who would abuse the discovery process.[8] To justify these subpoenas, the FTC complaint counsel filed the following statement:

> Complaint counsel seek basic corporate information from five Gibson's Discount Centers, not specifically named in the Complaint, but believed to be owned in whole or in part by named Gibson respondents. The information which could be provided in response to the subpoenas is relevant to considerations of direction and control by various individual respondents or various corporate respondents of Gibson's Discount Centers. Discovery on this point is necessary to meet the defenses asserted by counsel for the Gibson respondents. (Tr. 29, 30 and 34). The information requested is unavailable from any other source but it is relevant to demonstrate that respondents are now officers or shareholders of Gibson stores.
>
> In both the case of the respondent witnesses and the family-owned stores, complaint counsel have attempted to obtain the information voluntarily in accordance with the Administrative Law Judge's direction of June 26, 1975. Respondents' attorneys Bardwell Odum and Robert E. Rader, Jr., met with Complaint counsel in June 1975. Copies of the proposed Specifications for . . . the five Gibson Discount Centers were presented to them. Complaint counsel were advised by letter . . . that none of the requested information would be provided voluntarily.

[3] Gibson and the FTC complaint counsel disagree on whether both § 3.33 and § 3.34 apply to these subpoenas. The parties agree that these are adjudicative subpoenas issued after the filing of the complaint, and not investigative subpoenas.[9] But Gibson contends that since the subpoe[905]nas demand that a representative testify as well as produce documents,[10] the FTC must follow the adjudicative

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[7] F.R.Civ.P. 26(c); *see* 8 C. Wright & A. Miller, Federal Practice and Procedure § 2035 (1970).

[8] Critics argue, however, that applying for every discovery device creates opportunities for delay because it often requires briefs and oral argument. Bennett, note 6, *supra* at 344-46.

[9] Investigative subpoenas, issued prior to the filing of a complaint, are governed by 16 C.F.R. § 2.7. In general, courts apply a more lenient standard of relevance for investigative than for adjudicative subpoenas. *See e.g., FTC* v. *Texaco, Inc.*, D.C. Cir., 1977, 555 F.2d 862, 874.

H.R. Gibson, Sr., H.R. Gibson, Jr., and Gerald P. Gibson fought the enforcement of investigative subpoenas in this case. On appeal to this Court, however, we found their arguments without merit. *FTC* v. *Gibson*, 5 Cir., 1972, 460 F.2d 605.

[10] The form addressed to each appellant corporation was titled at the top: "Subpoena Duces Tecum," and provided that the corporation should

> appear before John Hemrick or any other designated presiding official of the Federal Trade Commission ... to testify in the matter of Herbert R. Gibson, Sr., individually and doing business as Gibson Products, and the Gibson Trade Shows, et al., Dkt. No. 9016.

At the bottom, there was added:

> And you are hereby required to bring with you and produce at said time and place the following books, papers, and documents described in the specifications which are attached hereto and made a part hereof.

rule on depositions, § 3.33,[11] along with the adjudicative rule on subpoenas duces tecum, § 3.34.[12] The FTC complaint counsel, on the other hand, argues that only § 3.34 applies. Neither party has shown us what we think is a definitive Commission statement on what rule or rules are relevant. Our decision, fortunately, does not depend on determining which rules apply.[13] We hold that the complaint counsel complied with the requirements under either § 3.34 or § 3.33.[14] [906]

Subpoena Duces Tecum: § 3.34

[4] Section 3.34(b) provides two requirements for a subpoena duces tecum. The party applying for the subpoena must show, first, the "general relevancy of the material" and second, "the reasonableness of the scope of the subpoena." Although the two

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[11] Section 3.33 provides in pertinent part:

(a) *When justified.* At any time during the course of a proceeding, whether or not issue has been joined, the Administrative Law Judge in his discretion may order the taking of a deposition and the production of documents by the deponent. Such order may be entered upon a showing that the deposition is necessary for purposes of discovery, and that such discovery could not be accomplished by voluntary methods. Such order may also be entered in extraordinary circumstances to preserve relevant evidence upon a showing that there is substantial reason to believe that such evidence could not be presented through a witness at the hearing. Insofar as consistent with considerations of fairness and the requirements of due process and the rules in this part, a deposition should not be ordered when it appears that it will result in undue burden to any other party or in undue delay of the proceeding, and it should not be ordered to obtain evidence from a person relating to matters with regard to which he is expected to testify at the hearing, or to obtain evidence which there is reason to believe can be presented at a hearing without the need for deposition, or to circumvent the orderly presentation of evidence at the hearing. Depositions may be taken orally or upon written interrogatories and cross-interrogatories before any person having power to administer oaths who may be designated by the hearing examiner.

[12] Section 3.34 provides in pertinent part:

(b) *Subpoenas duces tecum.* (1) Application for issuance of a subpoena requiring a person to appear and depose or testify and to produce specified documents, papers, books, or other physical exhibits at the taking of a deposition, or at a prehearing conference, or at an adjudicative hearing shall be made in writing to the Administrative Law Judge, and shall specify as exactly as possible the material to be produced, showing the general relevancy of the material and the reasonableness of the scope of the subpoena. Any motion to limit or quash such subpoena shall be filed within ten (10) days after service thereof, or within such other time as the Administrative Law Judge may allow.

(2) Subpoenas duces tecum may be used by any party for purposes of discovery or for obtaining documents, papers, books, or other physical exhibits for use in evidence, or for both purposes. When used for discovery purposes, a subpoena may require a person to produce and permit the inspection and copying of nonprivileged documents, papers, books, or other physical exhibits which constitute or contain evidence relevant to the subject matter involved and which are in the possession, custody, or control of such person.

[13] "The salutary and settled rule of administrative law is that the agency, and not the reviewing court, is to be accorded the first opportunity to construe its own regulations." *FTC* v. *Atlantic Richfield Co.*, D.C. Cir., 567 F.2d 96, 103.

[14] The controversy over which rules apply results from the ambiguous language of § 3.34(b), which states that subpoenas duces tecum are to be used to require "a person to appear and depose or testify and to produce specified documents . . . at the taking of a deposition. . . ." Gibson interprets this to mean that before a person can be required to produce documents he must be ordered to give a deposition. The FTC argues that the requirement to "appear and depose or testify" is limited to identifying documents; therefore, deposition rules do not apply. Gibson's interpretation of § 3.34, however, derives some support from a comparison with F.R.Civ.P. 45. *See* Lehigh Portland Cement Co., 1968, 73 F.T.C. 1247, 1248 n. 2 ("The scope of § 3.34 is in some respects similar to Rule 45 of the Federal Rules of Civil Procedure"). Under Rule 45, a subpoena duces tecum commanding a nonparty to produce documents but not to appear for a deposition can be quashed. *McLean* v. *Prudential S.S. Co.*, E.D.Va., 1965, 36 F.R.D. 421, 426; 9 C. Wright & A. Miller, Federal Practice and Procedure § 2455 (1971). But F.R.Civ.P. 45 and cases under it deal only with the necessity of testimony to identify the subpoenaed papers, not to give general testimony concerning the subject matter of the subpoenaed documents. Assuming that to obtain the documents prior to the FTC hearing a witness must also be subpoenaed to authenticate them, the general requirements of § 3.33 on depositions are satisfied by the simple fact of necessity.

paragraphs of the FTC's application do not contain the latter phrase, the subpoenas request only four specific items from each corporation, and the FTC explained that the information was unavailable from any other source. Due to the limited nature of the subpoenas, the ALJ would be justified in concluding that the subpoenas were reasonable in scope. In adddition, the complaint counsel obviously made a claim of relevance. Counsel explained in the application that the subpoenas were needed to determine the "direction and control" of the stores and to demonstrate that respondents in the complaint were "now officers or shareholders of the Gibson stores."

[5, 6] A more difficult question is whether this showing of relevance is sufficient. However, all that a reviewing court requires is that the material sought be "reasonably relevant." *E.g., FTC* v. *Browning*, 1970, 140 U.S.App.D.C. 292, 298, 435 F.2d 96, 102; *Adams* v. *FTC*, 8 Cir., 1961, 296 F.2d 861, 866, *cert. denied*, 1962, 369 U.S. 864, 82 S.Ct. 1029, 8 L.Ed.2d 83. Considering the FTC counsel's statement along with the complaint, *see Moore Business Forms* v. *FTC*, 1962, 113 U.S.App.D.C. 231, 307 F.2d 188, 189; *Adams* v. *FTC*, 8 Cir., 1961, 296 F.2d 861, 867, *cert denied*, 1962, 369 U.S. 864, 82 S.Ct. 1029, 8 L.Ed.2d 83, we believe this standard is met.

The gist of the complaint concerns the alleged special payments by wholesale distributors to H.R. Gibson, Sr., and others who ran the trade shows, along with the boycott of wholesalers who did not participate in the shows. Although we express no opinion on the merits of the complaint, unless H.R. Gibson could "direct and control" the purchasing of the retailers, it is unlikely that suppliers would make special payments to participate in the trade shows. Likewise, unless H.R. Gibson could "direct and control" local store buying, he could not prevent retailers from making purchases from suppliers who refused to participate in the shows. A list of shareholders and officers, as well as minutes of board meetings, from the local stores would help resolve who actually controls wholesale buying.

[7] Furthermore, although the application states, in part, that the subpoenas are relevant to determine who are "now the officers or shareholders of Gibson stores," the complaint also explains that "particularly since 1959" the respondents have induced discriminatory allowances from suppliers. Thus, more than the current year is relevant in discovering information about the alleged scheme. We, therefore, find no abuse of discretion in the ALJ's decision to allow these subpoena requests for five years of documents. *Adams* v. *FTC*, 8 Cir., 1961, 296 F.2d 861, 866, *cert. denied*, 1962, 369 U.S. 864, 82 S.Ct. 1029, 8 L.Ed.2d 83; *FTC* v. *United States Pipe and Foundry Co.*, D.C. Cir., 1969, 304 F.Supp. 1254, 1259.

Depositions: § 3.33

The rule on depositions, like § 3.34, has two pertinent requirements. First, an order for a deposition can be entered only upon a showing that "the deposition is necessary for purposes of discovery," and, second, it must be shown that "such discovery could not be accomplished by voluntary methods."

[8] Both these requirements were satisfied. The application explains that after the FTC requested documents in a meeting with Gibson attorneys, Gibson wrote a letter to the Commission refusing to comply. [907] In addition, FTC complaint counsel specifically stated that the subpoenas were "necessary" to meet the defenses asserted by the respondents in the complaint at a pretrial conference. At that meeting, an attorney for the respondents claimed that no "buyer" existed in this case.[15] His statement implied that the respondents did not control the buying of the local Gibson stores. We cannot say that the ALJ abused his discretion in approving the deposition based on what appeared necessary in order to learn the facts which bear on or counter this argument.

[9] Gibson also argues that another part of § 3.33(a) applies, which states that a "deposition should not be ordered to obtain evidence from a person relating to matters with regard to which he is expected to testify at the hearing, or to obtain evidence which there is reason to believe can be presented at a hearing without the need for a deposition . . .." We disagree. As the Commission explained in *Koppers Co., Inc.*, 1968, 74 F.T.C. 1571, 1572-73, § 3.33 allows for both discovery depositions and depositions to preserve relevant evidence. The limiting language in § 3.33(a) pertains only to preserving evidence, not to discovery depositions as are involved in this case.[16] The Commission made it clear that for discovery "[i]t is not the purpose of subsection (a) to deny to respondent advance knowledge of the testimony of . . . witnesses." *Id.* at 1573.[17]

[10] If Gibson's interpretation of § 3.33(a) was adopted, the "sporting theory" of litigation would dominate FTC hearings. Surprise and concealment would be the key trial weapons since each party would be denied advance knowledge of the testimony of the other party's witnesses. The right to cross-examination, moreover, embodied in the Administrative Procedure Act, 5 U.S.C.A. § 556(d), would be a hollow privilege without prior discovery depositions. In any event, it is not clear in this case if those who are deposed will be

[15] Official Transcript of Proceedings for May 30, 1975, at 29, cited in Application for Subpoenas, R. at 158.

[16] In its application to the ALJ, the FTC explains that the subpoenas were for the purpose of discovery. R. at 157-58. Gibson apparently agrees, pointing out in its brief that the subpoenas were issued by the FTC for discovery. Brief for the Appellants at 12.

[17] The Commission further explained in *Koppers* that the distinction between a deposition to preserve evidence and a deposition for discovery was a logical extension of paragraph (f)(2) in § 3.33, which allows depositions to constitute evidence only in special cases. The restriction in paragraph (a) which prohibits the taking of depositions for evidence when the deponent is able to testify at trial was merely meant to prohibit the taking of useless depositions to preserve evidence. 74 F.T.C. at 1572-73. *See* Bennett, note 6, *supra* at 336-39.

called as witnesses in the hearing. The complaint counsel should not be stymied in discovery because of the mere possibility that a person will later be a witness. *See* Bennett, note 6, *supra* at 336-39. We realize that the FTC discovery rules are restrictive, but the burden of preventing discovery abuse under the Commission rules is on the ALJ, not on any limitation in § 3.33(a) prohibiting depositions of witnesses.

Gibson has one final argument on alleged rule violations, which is not found in the letter of either § 3.33 or § 3.34. Under what Gibson calls the "*All-State* doctrine," the Commission must always offer an explanation for the failure to obtain information by "less burdensome means." *All-State Industries of North Carolina, Inc.*, 1967, 72 F.T.C. 1020, 1025. Whatever *All-State* said or was thought to say has recently been considerably watered down by the Commission. At first it was thought to stand for the idea that postcomplaint discovery can be restricted if it concerns what should have been learned in the precomplaint investigation. The Commission, however, rejected that idea in a "Supplemental Clarifying Opinion," *All-State Industries of North Carolina, Inc.*, 1968, 74 F.T.C. 1591, and in *Food Fair Stores, Inc.*, 1974, 83 F.T.C. 1578, which established an approach to facilitate discovery "in the light of the issues raised by the complaint," *Id.* at 1581, citing a number of post *All-State* decisions [908] in which a rigid interpretation of *All-State* was rejected.[18]

[11] Moreover, we do not face a situation similar to the problem the Commission confronted in *All-State*. Complaint counsel in that case failed to give any reason for requesting "all correspondence relating to purchases, sales and advertising for the period January 1, 1965 to date." 72 F.T.C. at 1024-25. The Commission naturally criticized counsel for making "such broad specifications" without showing that there were "less burdensome means" for obtaining the same information. In contrast to *All-State*, the FTC in Gibson has requested four items from each corporation, at least three of which must be maintained by state law for shareholder inspection.[19] These subpoenas simply do not contain the same "broad specifications." Although there may be cases in which "less burdensome means" must be shown, in this case, because the FTC has explained that the subpoenas are relevant, reasonable, necessary, and the voluntary

[17] The Commission summed it up:

> It shall not be a grounds to challenge complaint counsel's discovery to argue that the precomplaint investigation was the proper time to obtain the information sought, if such information is relevant to the issues raised in the pleadings. This is the holding of *All-State*, and reflects the position of the Commission. To the extent that *All-State* is in seeming conflict with the above, it is held confined to its own facts and not further controlling.
>
> We feel this interpretation of *All-State* has also been taken by the federal courts, in an appeal arising from the *Lehigh* case [74 F.T.C. 1589]. In *F.T.C. v. Browning*, [140 U.S.App.D.C. 292] 435 F.2d 96 (1970), the United States Circuit Court of Appeals for the District of Columbia denied that a challenge to postcomplaint discovery could be predicated on the alleged inadequacies of precomplaint investigation. The adequacy of a discovery request is determined by whether the request is reasonable in scope, the material relevant to the issues of the case, and the things sought within the proper bounds of discovery. The court upheld the issuance of the discovery subpoena in question.

83 F.T.C. at 1582 (footnote omitted).

[18] Tex.Bus.Corp.Act Ann. art. 2.44.A (Vernor) (minutes of shareholders' and directors' meetings, along with the names and addresses of shareholders, shall be kept at the registered office or principal place of business). *Accord*, La.Rev.Stat.Ann. § 12:102 (West).

compliance has failed, no additional hurdles remain. To cap it off, Gibson does not even begin to suggest what less burdensome means would wrench this information out of these obdurate adversaries.

Other Contentions

[12, 13]Gibson, in addition, challenges the statutory authority of the Commission to issue the subpoenas, claiming that it is illegal to request records for five years because the FTC is limited to prosecuting currently existing practices. But it is clear that the FTC can issue orders forbidding practices that have been abandoned. *Cotherman* v. *FTC*, 5 Cir., 1969, 417 F.2d 587, 594-95; *Carter Products, Inc.* v. *FTC*, 5 Cir., 1963, 323 F.2d 523, 531. Courts also have approved FTC subpoenas covering relatively long periods of time. *E.g.*, *Adams* v. *FTC*, 8 Cir., 1961, 296 F.2d 861, 867, *cert. denied*, 1962, 369 U.S. 864, 82 S.Ct. 1029, 8 L.Ed.2d 83 (nineteen years of information on a conspiracy); *FTC* v. *Tuttle*, 2 Cir., 1957, 244 F.2d 605, *cert. denied*, 354 U.S. 925, 77 S.Ct. 1379, 1 L.Ed.2d 1436 (four years of documents on a merger). We hold that, as long as the material is reasonably relevant to the alleged violations, it can be discoved by subpoena, regardless of whether it concerns current or past conduct.

[14] We also do not believe the subpoenas are overly broad, as Gibson contends, simply because the requests may include confidential information. *See FTC* v. *Lonning*, 1976, 176 U.S.App.D.C. 200, 208-209, 539 F.2d 202,, 210-11; *FTC* v. *Tuttle*, 2 Cir., 1957, 244 F.2d 605, 616, *cert. denied*, 354 U.S. 925, 77 S.Ct. 1379, 1 L.Ed.2d 219. Nothing in our opinion, however, prevents the ALJ or the Commission from restricting public disclosure of the information as the law allows.[20] *See, e.g.*, *FTC* v. *Lonning*, 1976, 176 U.S.App.D.C. 200, 208-209, 539 F.2d 202, 210-11; *Graber Mfg. Co.* v. *Dixon*, D.C. Cir., 1963, 223 F.Supp. 1020; *FTC* v. *Bowman*, N.D.Ill., 1957, 149 F.Supp. 624, 630-31, *aff'd*, 7 Cir., 248 F.2d 456.

In conclusion, since the FTC complied with its rules and since in all respects the subpoenas duces tecum are relevant, definite, and within the bounds of statutory authority, enforcement is necessary. *See United States* v. *Morton Salt Co.*, 1950, 338 U.S. 632, 652, 70 S.Ct. 357, 368, 94 L.Ed. 401, 406; *Genuine Parts Co.* v. *FTC*, 5 Cir., 1971, 445 F.2d 1382, 1391. Our holding, moreover, is in accord with FTC policy that "to the fullest extent practicable the strategy of surprise and the art of concealment will have no place in a Commission proceeding."[21] The five Gibson corporations cannot keep playing hide-and-seek with the FTC.

AFFIRMED.

[20] The Freedom of Information Act exempts confidential business information from disclosure, 5 USCA § 552(b)(4), and the FTC Act forbids making public "trade secrets and names of customers." 15 U.S.C.A. § 46(f).

[21] *All-State Industries of North Carolina, Inc.*, 1967, 72 F.T.C. 1020, 1023.

FRANCIS FORD, INC.
v.
FEDERAL TRADE COMMISSION et al.*

No. 78-242. F.T.C. Docket No. 9073.

(United States District Court, District of Oregon, March 20, 1978)

In denying preliminary injunctive relief to a respondent in an FTC adjudication, court held that it lacked jurisdiction over the matter of the Administrative Law Judge's refusals to grant a continuance, to deny withdrawal of two other respondents from adjudicative portion of the proceeding, and to consider petitioner's proposed settlement on an expedited basis, since petitioner had failed to exhaust administrative remedies.

Michael J. Esler, Portland, Ore., for plaintiff.
Thomas C. Lee, Asst. U.S. Atty., Portland, Ore., for defendants.

Before BURNS, *Judge.*

OPINION AND ORDER

On Friday, late in the afternoon, after a relatively brief hearing, I granted plaintiff a preliminary injuction which substantially resembles a temporary restraining order. By its terms, it was to expire at 5:00 p.m. on Monday, March 20, 1978, unless extended by the Court. (I use the term preliminary injunction because I am of the impression that the relief granted is that of a preliminary injunction rather than a temporary restraining order.)

On Friday, I indicated that I thought it was likely that I would not extend the preliminary injunction beyond Monday. Since Friday, I have had the benefit of some amount of time for reflection and analysis, and have briefly studied the cases cited by both parties. I have concluded that the injunction should expire and not be extended.

I do so for two reasons. First, I find and hold that plaintiff is required to and has not exhausted its administrative remedies. Since the Federal Trade Commission Act, 15 U.S.C. § 45(c), (d) vests jurisdiction over appeals from final Commission orders exclusively in the courts of appeals, whether exhaustion of administrative remedies is required is, in this case a jurisdictional question. *Reuben H. Donnelly Corp. v. F.T.C.,* 1977-2 TRADE CASES ¶61,783 (W.D. Ill. 1977).

That judicial relief for an allegedly threatened injury is unavailable until the prescribed administrative remedy has been exhausted is a

*Not reported in Federal Reporter. Reported in Trade Reg. Rep. ¶61,958 at 74,061 (1978-1 Trade Cases).

familiar rule of administrative law. *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938); *State of Cal. Ex Rel Christensen v. F.T.C.*, 549 F.2d 1321, 1323 (9th Cir. 1977), *cert. denied*, 434 U.S. 876, 46 U.S.L.W. 3219 (1978). The exhaustion requirement is intended to facilitate the development of a full factual record, to encourage the exercise of administrative expertise and discretion and to promote judicial and administrative efficiency, *Downen v. Warner*, 481 F.2d 642, 643 (9th Cir. 1973).

There are situations in which the reasons for exhaustion of administrative remedies are inapplicable or are outweighed by other considerations, and the doctrine is not applied. *E.g., Downen, supra.* The plaintiff contends that this is such a case. After a review of the cases, I am satisfied that it is not.

Plaintiff relies on *Leedom v. Kyne*, 358 U.S. 184 (1958) and cases which have followed it. In order to invoke *Leedom*, however, the plaintiff must show that the statutory mechanism for appellate review of the challenged agency action is inadequate to protect his rights. *Donnelly, supra.*

Plaintiff claims that appellate review of the Commission action is inadequate because it could not repay its damages and costs of defense. Such harm has been held to be insufficient. *Id.*

Plaintiff also contends that appellate review would be inadequate because it would delay any protection against violation of its constitutional rights to due process and equal protection. To invoke this exception to the requirement of exhaustion, a litigant must make a substantial showing that his constitutional rights have been violated. See *American General Insurance Co. v. F.T.C.*, 496 F.2d 197 (5th Cir. 1974). I am satisfied that plaintiff has not made such a substantial showing.

The purposes for the exhaustion requirement are fully applicable in this case. Plaintiff claims to be aggrieved by the administrative law judge's refusals (at least as of Friday) to grant a continuance, to deny withdrawal of Ford and Ford Motor Credit Corporation from the adjudicative portion of the proceedings, or to consider plaintiff's proposed settlement on an expedited basis. A full factual record would be of great assistance in evaluating the appropriateness of such actions. Moreover, the desireability of such action, particularly the desireability of proceeding against Francis Ford alone, are surely matters which are sufficiently within the Commission's expertise that it should be afforded the first opportunity to address them.

Judicial economy is, in this case, more clearly served by requiring rather than waiving exhaustion. The administrative law judge has the authority to grant a continuance or order the joinder of Ford or Ford Motor Credit Corporation whenever it appears to him that such

an action is warranted. He will, in due course, rule on the acceptability of the proposed settlement. Should he take any of the actions after the hearing has commenced, it would be unnecessary for this court to consider plaintiff's claims of deprivation of constitutional rights.

Accordingly, I hold that, in this case, the doctrine of exhaustion of administrative remedies is applicable. Thus more mature analysis than was permitted by the shortness of time on Friday convinces me that I lack jurisdiction to enter the requested preliminary injunction.

Secondly, even if I am in error in concluding that I do not have jurisdiction, I am satisfied that the plaintiff has failed to meet either of the alternative criteria for the granting of preliminary injunction relief set out in *Inglis v. I.T.T. Baking Co.*, 526 F.2d 86 (9th Cir. 1975).

In view of the general scheme, which affords review of agency proceedings by the court of appeals, I am satisfied that there is no sufficient showing of either a substantial likelihood that plaintiff will prevail on the merits in this case or of sufficiently serious harm coupled with a fair chance of success on the merits. Under *Inglis*, plaintiff must show one or the other.

Here, plaintiff's basic claim is that its constitutional rights to due process and equal protection are being violated because the agency is going ahead with its proposed proceedings, in a fashion clearly envisioned by the Federal Trade Commission Act. It is hardly a denial of due process or equal protection to insist that the proceedings go forward in a manner which has been scheduled for some time. Certainly, the administrative law judge has adequate flexibility to make rulings which safeguard both the interests of plaintiff, as respondent, in light of the recent settlement of the Commission with Ford and Ford Motor Credit Corporation. If the district court were to intervene at every step along the way based upon a constitutional claim, it would make a shambles of the agency processes. The language of the statute which Congress passed certainly did not intend such a procedure.

If, at the conclusion of the proceedings, plaintiff, as respondent there, feels aggrieved, adequate review is available through a petition to the Ninth Circuit to modify or to set aside any order issued by the Commission.

For these reasons, therefore, I decline to extend the injunction beyond 5:00 p.m. today, March 20, 1978. A copy of this will be filed with the Clerk and furnished to the parties, and the substance of this opinion will be read over the phone to the offices of counsel for the respective parties.

Based upon the foregoing,

It is Ordered:

1. The injunction issued orally on Friday, March 17, 1978, will expire at 5:00 p.m. Monday, March 20, 1978;

2. Insofar as plaintiff has requested that either a temporary restraining order or preliminary injunction issue and be effective after 5:00 p.m. Monday, March 20, 1978, such request is Denied.

UNITED STATES v. BROWN & WILLIAMSON TOBACCO CORP.*
76 Civ. 810 (JMC). F.T.C. Docket No. C-2183.

UNITED STATES v. LIGGETT GROUP, INC.*
76 Civ. 811 (JMC). F.T.C. Docket No. C-2185.

UNITED STATES v. AMERICAN BRANDS, INC.*
76 Civ. 812 (JMC). F.T.C. Docket No. C-2182.

UNITED STATES v. R.J. REYNOLDS TOBACCO CO., INC.*
76 Civ. 813 (JMC). F.T.C. Docket No. C-2184.

UNITED STATES v. LORILLARD*
76 Civ. 814 (JMC). F.T.C. Docket No. C-2180.

UNITED STATES v. PHILIP MORRIS INCORPORATED*
76 Civ. 815 (JMC). F.T.C. Docket No. C-2181.

(United States District Court, Southern District of New York, March 28, 1978)

In civil penalty actions charging six cigarette manufacturers with violations of individual F.T.C. consent orders, court, in considering Government's motion to further amend complaints by including allegations of industry-wide agreement to a uniform interpretation of the consent orders, held that the allegations did not constitute new claims; nor were they impertinent, scandalous, or indefinite. Whether or not plaintiff planned to use them to build its case for consolidation was irrelevant to instant actions.

Accordingly, Government's motion was granted and motions of three defendants to strike allegations from the complaint were denied.

Before WEINSTEIN, *District Judge.*

MEMORANDUM DECISION

Motion by the Government for leave to serve and file a second amended complaint in each of the above-entitled matters, is granted.

Motions by Brown & Williamson Tobacco Corporation ("Brown & Williamson"), Philip Morris Incorporated ("Philip Morris") and Lorillard to strike certain paragraphs from the Government's second amended complaint, is denied.

*Not reported in Federal Reporter. Reported in Trade Reg. Rep. ¶ 62,067 at 74,638 (1978-1 Trade Cases). For case before the Commission, see 80 F.T.C. 455.

In each of the above-entitled related actions for civil penalties based upon violations of consent orders entered into between the Federal Trade Commission ("FTC") and the cigarette manufacturer defendants, the Government seeks to serve and file a second amended complaint. Defendants Liggett Group Inc. ("Liggett"), American Brands, Inc. ("American Brands") and R.J. Reynolds Tobacco Company, Inc. ("R.J. Reynolds") oppose the Government's applications on the ground that the complaints, as amended, contain immaterial, irrelevant and scandalous allegations that would unduly prejudice them. Additionally, Liggett and American Brands contend that the second amended complaints lack sufficient specificity. Defendants Brown & Williamson, Philip Morris and Lorillard stipulated to the filing of second amended complaints in their respective cases, but move to strike the same allegations objected to by the other cigarette companies. Fed.R.Civ. P. 12(f). In addition to claiming that the objected to matter is immaterial, impertinent or scandalous, moving defendants argue that the allegations in question may not be asserted by the Justice Department without prior certification by the FTC. See 15 U.S.C. § 56(a)(1)(A).

The Court finds that the proposed amended complaints fall within the liberal standard governing Fed.R.Civ. P. 15 and contain nothing strikable under Fed.R.Civ. P. 12(f).

The Facts

On March 30, 1972, the FTC issued consent orders requiring the defendants herein to display clearly and conspicuously in their media advertising the Surgeon General's warning that cigarette smoking is a health hazard. Subsequently, on August 1, 1975, the FTC advised the defendants that certain of their advertising practices were in violation of the consent orders and that it intended to bring actions for civil penalties based upon the alleged violations. As to violations concerning billboards, transit cards and typography ("the 180-day violations"), however, the FTC granted a 180-day grace period for voluntary compliance.

On October 17, 1975, the Government instituted the instant actions in the United States District Court for the District of Columbia. Each complaint alleged violations of the consent orders, but excluded the 180-day violations. On January 20, 1976 District Judge William B. Bryant ordered the six enforcement actions transferred to the Southern District of New York, where they are presently pending before the Court.

When the defendants failed to cure the 180-day violations by the prescribed period, the FTC granted the companies an additional 45 days for compliance. At the expiration of this period, however, the

FTC requested that the six pending complaints be amended to include the 180-day violations.[1]

Discussion

The focus of the instant motions is not the inclusion of the 180-day violations, but rather, the proffered allegations of industry-wide meetings at which the six cigarette manufacturers agreed to a uniform interpretation of the consent decrees. It is the Government's position that the violations which form the subject matter of these proceedings result from industry-wide policy established by this agreement.

Defendants claim that these allegations are irrelevant to actions for civil penalties based upon alleged violations of individual consent orders. According to the defendants, the inclusion of "conspiratorial" allegations is a ploy by the Government to lay the groundwork for a subsequent motion to consolidate these six actions for trial—a motion that the cigarette manufacturer defendants will vigorously oppose.

The issue whether the Government intends to move for consolidation of the six pending cases, and indeed it very well may,[2] is irrelevant to the Court's consideration of the filing of a second amended complaint. Additionally, even were the Court to find that the Government hoped to build its case for consolidation by reason of the allegations in question, this would not constitute "bad motive" sufficient to bar an amended complaint, assuming the inclusion of the allegations was otherwise justifiable.

Rule 15(a) of the Federal Rules of Civil Procedure states that leave to amend "shall be freely given when justice so requires." This Rule has been interpreted by the Supreme Court to mean that,

> [i]n the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.—the leave sought should, as the rules require, be "freely given."

Foman v. Davis, 371 U.S. 178, 182 (1962); accord, *Clay v. Martin*, 509 F. 2d 109, 113 (2d Cir. 1975).

As noted by the Govenment, the filing of amended complaints at this time will not delay the trials. And, contrary to defendants' asser-

[1] Prior to the transfer of these actions, the complaints were amended once as of right Fed.R.Civ. P. 15(a).

[2] On December 5, 1975, while the actions were pending in the District of Columbia, the Government moved to consolidate. When, on January 20, 1976, the cases were ordered transferred to the Southern District of New York, Judge Bryant additionally denied the Government's consolidation motion on the ground that such a decision should be made by the transferee court.

tions, the Court does not find that the included allegations of an industry-wide agreement will unduly prejudice them.

In further opposition to the Government's motion, it is argued that an amendment should not be allowed where the allegations contained therein would be strikable under Fed.R.Civ. P. 12(f). In this regard, moving defendants claim that the allegations in question, while adding nothing to the complaint, are scandalous.

Motions to strike allegations from a complaint are strongly disfavored and will be granted only where "it is clear that (the allegations) can have no possible bearing upon the subject matter of the litigation." 2A *Moore's Federal Practice* ¶ 12.21, at 2429; accord, *Federated Dep't Stores, Inc. v. Grinnell Corp.*, 287 F.Supp. 744, 747 (S.D.N.Y. 1968) (Cooper, J.). Here, the allegations of an industry-wide policy or agreement are relevant to the size of the penalty to be imposed, should liability be found, *United States v. J.B. Williams Co.*, 498 F.2d 414, 438 (2d Cir. 1974) (Friendly, J.), and are allowable as background information, see, e.g., *Hoffman Motors Corp. v. Alfa Romeo S. p. A.*, 244 F.Supp. 70, 81-82 (S.D.N.Y. 1965) (van Pelt Bryan, J.). Accordingly, the allegations are neither impertinent nor scandalous.[3]

The other arguments raised by defendants have been considered and are rejected. Specifically, in response to the claims of indefiniteness, Fed.R.Civ. P. 8, 12(e), the Court finds that the amended complaints fairly notify the defendants of the nature of the claims against them. See *F.T.C. v. Consolidated Foods Corp.*, 396 F.Supp. 1344, 1348-49 (S.D.N.Y. 1974) (Knapp, J.); 2A *Moore's Federal Practice* ¶ 12.18, at 2389. In rejoinder to the contention of the moving defendants, that the allegations sought to be stricken exceed the authority of the Attorney General, see 15 U.S.C. § 56(a)(1)(A), the Court finds that the allegations do not constitute new claims but merely additional evidentiary facts relevant to the claims already asserted. As such, neither the FTC's notification, U.S.C. § 56(a)(1)(A), as amended by Act of Jan. 4, 1975, Pub.L. 93-637, Title II, § 204(a), 88 Stat. 2199, nor certification, 15 U.S.C. § 56 (1938) (amended 1975), to the Justice Department would be required before these allegations could be added.[4]

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[3] According to Professor Moore,

"Impertinence consists of any allegation not responsive nor relevant to the issues involved in the action and which could not be put in issue or be given in evidence between the parties. To determine whether matter is impertinent one must first determine the scope of the issues in controversy and then, under 12(f), determine whether the matter injected in the pleadings is relevant or material thereto.

* * * * * * *

"Scandal in general consists of any unnecessary allegation which reflects cruelly upon the moral character of an individual or states anything in repulsive language which detracts from the dignity of the court. The term 'scandal' is not so broad as the term 'impertinence', and matter which might seem to be included in the former term if applied literally will be stricken only if it is irrelevant and immaterial to the issues in controversy."

2A *Moore's Federal Practice* ¶ 12.21, at 2421-27 (footnotes omitted).

[4] Consequently, the Court need not decide the question whether the 1975 amendment to 15 U.S.C. § 56 eliminates the requirement of certification by the FTC for civil penalty actions.

Conclusion

For all the above reasons, the Government is granted leave to serve and file second amended complaints in the six actions herein, and the motions of defendants Brown & Williamson, Philip Morris and Lorillard to strike certain allegations from the complaints, as amended, are denied.

So ordered.

DONALD L. BACHMAN et al. v. MICHAEL PERTSCHUK*

Civ. A. No. 76-0079

(United States District Court, District of Columbia, April 25, 1978)

Roger Warin, Steptoe & Johnson, Washington, D.C., *Roderic V.O. Boggs, Washington Lawyers' Committee for Civil Rights Under Law,* Washington, D.C., for plaintiffs.

Earl J. Silbert, U.S. Atty., *Robert N. Ford, Robert M. Werdig, Jr.,* Asst. U.S. Attys., Washington D.C., *Michael N. Sohn,* General Counsel, F.T.C., Washington, D.C., for defendant.

Before RICHEY, *District Judge.*

MEMORANDUM

Upon consideration of the stipulation entered into by the parties, the oral hearing held on this matter, and the comments submitted by all interested parties, the Court has decided to approve the stipulation, pursuant to Fed. R. Civ. P. 23(e).

The Court would like to praise the Commission, its Chairman, its members and its counsel, as well as plaintiff's counsel, for their efforts and the cooperation that they have given to the Court, not the least of which was their attendance at endless conferences with the Court in an endeavor to achieve a just resolution to this matter. All parties should take pride in the fact that this litigation has culminated in what may become a model for resolving class actions in a way which is the least expensive and most effective in terms of reaching the objectives of the Civil Rights Act of 1964, as amended by the 1972 Amendments. Although this case involves the public sector, the Court hopes that this stipulation will become a model for eliminating discrimination in the private sector as well.

The Court wishes to note that this stipulation is being approved because it adequately protects the interest of the class members and will not work to the detriment of any other person. The stipulation establishes goals—not fixed quotas. Thus, it does not establish absolute percentages, but only guidelines. Moreover, should any person think his rights have been violated by the implementation of these goals, the same recourse that the plaintiffs in this case resorted to—an action under Title VII—will be available to them. Accordingly, the Court will approve the stipulation, fully satisfied that the purpose of Title VII has been fulfilled in this case.

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*Not otherwise reported.

STIPULATION AND ORDER

Plaintiff Donald L. Bachman filed an administrative complaint of race discrimination on May 2, 1975, alleging, *inter alia*, that the Federal Trade Commission ("Commission") improperly failed to promote him to GS-15.

On January 16, 1976, after more than 180 days had passed since the filing of his administrative complaint without the issuance of a final agency decision, plaintiff filed this action in the United States District Court challenging certain of the Commission's employment practices as racially discriminatory. The plaintiff sought to bring this action on behalf of other similarly situated blacks and other minorities.

The plaintiff alleges, *inter alia*, that the Commission's employment practices violate Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*

On July 29, 1976, the Court conditionally certified a class of individuals described as (1) all blacks, GS-9 and above, presently employed as professionals and semi-professionals at the Federal Trade Commission; (2) all blacks who have applied for such positions and have been denied employment by reason of racial discrimination; and (3) all blacks who have been employed in such positions by the Commission in the past and have left or have been discharged by reason of racial discrimination.

On September 26, 1977, the Court granted the motion of Doris L. Hollingsworth to intervene as a plaintiff.

The parties have endeavored to resolve these matters through agreement and have concluded that it is in the best interests of all concerned to settle this action in the manner and on the terms set forth in this Stipulation.

This Stipulation is entered into voluntarily by the Commission in order to reaffirm its policy of seeking out, employing, and promoting the best qualified individuals possible without regard to race, color, religion, national origin or sex and as an effort to respond to and rectify perceptions that minorities have not been well-represented in the Commission's professional workforce.

Therefore, upon due consideration of the record herein, and upon the Stipulation of the parties, before the taking of any testimony and without trial or adjudication of any issue of fact or law herein, the Court, being fully advised of the premises, concludes that it has jurisdiction over the parties and subject matter of this action and further ORDERS AND DECREES that:

I. *Class Representation*

The Court hereby gives final certification to a class consisting of (1) all blacks, GS-9 and above, presently employed by the Commission as attorneys, economists, accountants, consumer protection specialists, research analysts and computer specialists; (2) all blacks who have applied for such positions and have been denied employment by reason of racial discrimination; and (3) all blacks who have been employed in such positions by the Commission in the past and have left or have been discharged by reason of racial discrimination.

II. *Scope of Stipulation*

This Stipulation applies except where otherwise stated, to minority persons[1] employed by the Commission at GS-9 and above as attorneys, accountants, economists, consumer protection specialists, research analysts and computer specialists.

III. *Non-Discrimination*

The Commission, its officers, agents, employees, and all persons in active concert or participation with them or at their direction, shall hire and assign applicants for employment and shall promote, train (to the extent training is offered), discipline, demote and dismiss employees on the basis of individual merit, without regard to race, or color, and without engaging in any act or practice which has the purpose or the effect of illegal discrimination against any individual because of his or her race or color. Consistent with this obligation, the Commission will make additional efforts to find and extend offers to qualified minority applicants and to insure that all employees receive the types of assignments and delegation or responsibility required for promotion.

The Commission shall not engage in acts or practices constituting a reprisal of any kind against any individual because of opposition to any practice declared unlawful under Title VII or because of filing of a charge, giving of testimony or assistance or because of participation in any manner in any investigation, proceeding, or hearing under Title VII, or because of any assertion of rights under this Stipulation.

IV. *Administration*

1. The defendant, after the Court's approval of this Stipulation, shall appoint Mr. Carol Thomas, Secretary of the Commission, as Administrator of this Stipulation. The Administrator will have the

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[1] The term "minority persons," as used in this Stipulation includes Black, Hispanic, Asian, and Native Americans.

supervisory responsibility for the Commission's compliance with this Stipulation and will be accountable only to the Chairman and the Court for the exercise of this responsibility. In the performance of all duties under this Stipulation, the Administrator will consult with, and obtain the advice of, the Commission's Director of Equal Employment Opportunity. Should Mr. Thomas be unable to serve as Administrator, the defendant, after consultation with counsel for plaintiffs, shall appoint a successor Administrator acceptable to plaintiffs' counsel.

2. For a period of five years following the Court's approval of this Stipulation,[2] the Chairman of the Commission will meet annually with the Director of Equal Employment Opportunity at the Commission, the Executive Director, the Administrator, and the heads of each of the Commission's bureaus and major operating offices,[3] within sixty (60) days following the submission of the reports required by this Stipulation, to measure the Stipulation's effectiveness, to ascertain what each manager has done in the preceding year to insure that the goals and objectives of the Stipulation have been met, and to ascertain what specific commitments will be made to insure the implementation of the goals of the Stipulation for the coming year.

V. *Affirmative Action Goals*

While it is the Commission's objective to hire and promote employees on the basis of individual merit without regard to race, color, sex, religion or national origin, the Commission is aware that it has in the past been less successful in hiring and retaining qualified minority employees than it has in hiring and retaining qualified nonminority employees. Accordingly, the Commission has agreed to the following employment goals for the period covered by this Stipulation. While these goals are not to be considered rigid or inflexible quotas, the Commission is expected to pursue them in good faith.

If the Commission determines that such goals are not reasonably attainable, the Commission may notify plaintiffs' counsel and the Court and will submit a proposed revision of such goals. If plaintiffs' counsel questions the Commission's good faith efforts to meet its goals, he/she shall notify the Commission within fifteen (15) days of receipt of such advice or of reports required by this Stipulation. In either event the parties shall endeavor to resolve their differences within the next thirty (30) days. If the parties are unable to resolve

[2] References to "approval" of this Stipulation mean final approval of the Stipulation.

[3] Unless otherwise indicated, "Bureau" includes the Bureau of Competition, the Bureau of Consumer Protection, and the Bureau of Economics, and "Office" includes the Office of the Secretary, the Office of the General Counsel, the Office of the Executive Director, the Office of Policy Planning, and the Regional Offices.

their differences within that time, either party may raise the matter in these proceedings within fifteen (15) days thereafter.

A. Attorneys and Law Clerks[4]

At least 17 percent of all job offers to new attorneys or law clerks in fiscal year 1979 shall be to minorities. For any succeeding reporting year it shall be the Commission's goal that offers made to minority applicants for positions as attorneys or law clerks shall be in a proportion equalling or exceeding 165 percent of the proportion of graduates from ABA approved law schools for the preceding year who are minorities unless for the preceding reporting year the proportion of all Commission attorneys and law clerks who are minorities is more than 90 percent of said proportion of minority graduates in the preceding reporting year. If for any year the rate of minority acceptances of offers should be more than 15 percentage points below the non-minority acceptance rate, the Commission shall notify plaintiffs' counsel and consult with them about what steps, if any, should be taken.

B. Economists, Accountants, Consumer Protection Specialists, Research Analysts and Computer Specialists.

1. The Commission shall, at the beginning of the 1978-79 academic year, contact the department of economics at each college or university attended by current Commission economists, to seek assistance in locating qualified minority applicants for positions as economists. Each minority individual identified shall be contacted by letter to ascertain their interest in being considered for employment by the Commission. The Commission will attempt to interview any interested minority applicant identified, and will make all reasonable efforts to interview minority applicants who attend the annual meetings of either the Southern Economics Association or the American Economics Association. Within 30 days of the Court's approval of the Stipulation, the Commission will contact the National Urban League and the National Economics Association to seek assistance in identifying minority economists. The Commission will contact each individual identified to ascertain his/her interest in being considered for employment at the Commission. The results of these efforts shall be reported to plaintiffs' counsel by the Commission and they shall confer to decide if a goal is appropriate.

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[4] For the purpose of the goals established in this section, the term "attorneys and law clerks" shall refer to those employees of the Commission in the GS-904 and 905 personnel categories.

2. Should the minority proportion of economists, accountants, consumer protection specialists, research analysts, and computer specialists, employed by the Commission at the end of a reporting period under Paragraph X have declined by more than 20 percent from the proportions existing as of January 1, 1978, and if that decline has continued or continues for more than three months, the Commission shall notify plaintiffs' counsel and they shall confer about what goal or goals would be appropriate.

VI. *Recruitment and Hiring*

1. Within sixty (60) days of the Court's approval of this Stipulation, to the end of assuring that such criteria are objective and job-related insofar as practicable, the Commission, with the advice and assistance of plaintiffs' counsel, will retain an independent third party, acceptable to plaintiffs' counsel who is experienced in conducting validation studies on hiring and promotion criteria and procedures, to reexamine Commission hiring and promotion criteria procedures with regard to attorneys, economists, accountants, consumer protection specialists, research analysts and computer specialists and determine the validity of such criteria and procedures, and to propose additional appropriate criteria and procedures, if any. The results of the study will be reported to the Administrator, the Executive Director of the Commission and plaintiffs' counsel within one hundred and eighty (180) days from being retained. Any criterion and/or procedure proposed to be used in the future will be set forth along with the justification for its use in terms of job performance. If plaintiffs' consel does not concur with the expert's conclusions, he or she shall inform the Administrator. If the expert concludes, and the Administrator concurs, after considering the views of the plaintiffs' counsel, that a particular criterion bears no substantial relationship to job performance, that criterion will no longer be used as a standard for hiring and/or promotions unless its use is required by applicable laws or regulations, in which event the Commission will communicate the conclusions of the expert and the Administrator to the Court. If the Administrator does not concur with any of the expert's conclusions, he or she shall inform plaintiffs' counsel, setting forth his reasons in writing, and plaintiffs' counsel shall have the opportunity to request the Administrator to reconsider his or her nonconcurrence, in which event the Administrator shall set forth in writing any additional reasons for his or her nonconcurrence. Plaintiffs retain such rights as they may otherwise have to petition the Court should they object to the Administrator's decisions on hiring and/or promotion criteria.

2. The Commission will delete the Law School Admissions Test (LSAT) inquiry from the attorney application form. Pending receipt of the study provided for in subparagraph 1, the Commission will instruct all persons responsible for hiring and promoting Commission attorneys and law clerks not to use the LSAT as a criterion for hiring and/or promotion decisions.

3. Pending receipt of the study provided for in subparagraph 1, the Commission will continue to attempt to identify minority and other law students who may not satisfy all traditional hiring criteria, and to observe them in the workplace by hiring them for part time or other temporary employment (*e.g.*, the current Summer Legal Intern Program) with the goal of hiring them for full time employment upon graduation if warranted by their actual performance.

4. Each interviewer for the Commission will be given training in Equal Employment Opportunity policies and in interviewing techniques by an individual or organization trained in these matters and possessing special expertise regarding the interviewing of minority individuals.

5. All recruitment programs for individuals entering at the GS-9 level or above will be designed to increase minority participation in all essential recruitment processes.

6. The Administrator shall be provided with the resumes and/or applications of all known minority applicants for positions GS-9 and above. Any applicants whom the Administrator designates will be afforded an interview with a Commission recruitment interviewer.

7. Any application which the Administrator designates will be reviewed personally by the appropriate Bureau or Office head or his designee. If the Bureau or Office head or his designee determines not to extend an offer to such applicant, the head or his designee shall set forth the reasons for so determining in a memorandum to the Administrator.

8. In an effort to ensure to the extent reasonably possible that qualified condidates become aware of employment opportunities at the Commission, the Commission will make special efforts to disseminate information about the Commission to minority law students, attorneys, and economists to stimulate their interest in employment opportunities at the Commission. In particular, the Commission will take appropriate steps to ensure that notice of openings for experienced attorneys be more widely disseminated. The Commission shall inform plaintiffs' counsel annually of what steps it has taken pursuant to this paragraph and how these steps differ from and/or supplement previous Commission procedures.

9. After consultation with plaintiffs' counsel, the Commission shall revise brochures and other materials distributed to law schools by

and about the Commission to state that the Commission devotes special attention to the recruitment of minority applicants.

VII. *Promotion and Training Opportunities*

1. Each individual who supervises three or more employees at the GS-9 or higher level concurrently will be required to take a course in Equal Employment Opportunity policies within nine months of the Court's approval of this Stipulation. The content, length, and instructor(s) of such course shall be determined with the advice and assistance of plaintiffs' counsel. Thereafter, any individual who becomes the supervisor of three or more employees at the GS-9 or higher level concurrently will be required to take such a course within one year after assuming the responsibility for supervising a third GS-9 or higher level employee.

2. The Executive Director shall issue, within six months of the expert's study under Section VI(1), uniform criteria, consistent with any applicable criteria validated and approved by the expert and the Administrator pursuant to Section VI(1), for promotion of attorneys, economists, and accountants. Each Bureau and Office head shall issue, within sixty (60) days thereafter, an interpretive guide to explain how such criteria apply to the particular operations of that Bureau or Office.

3. The Commission will establish a data retrieval system by which the average time-in-grade for those eligible for promotion[5] at each General Schedule level in each bureau and office may be ascertained. This information will be made available, in aggregate form, to all Commission employees and plaintiffs' counsel upon request. The Commission shall also provide plaintiffs' counsel with information (but not the names of the employees involved) concerning the location, grade and position of each minority employee eligible for promotion who has been in grade twenty-five percent longer than the average time-in-grade for non-minority employees in the same grade, position and bureau or office.

4. The Commission shall insure that minority employees are given work opportunities and assignments consistent with their abilities which provide them with the experience necessary for promotion. Each Assistant Director or Assistant General Counsel will assure that each employee is given an opportunity to satisfy the promotion criteria and guides to be issued pursuant to Section VII(2).

5. Every employee evaluation will contain a specification of major assignments, an analysis of the employee's performance in each, and

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[5] "Eligible for promotion" in this Stipulation means those that are eligible under applicable statutes and regulations.

a correlation with the promotion criteria, the employee's time-in-grade and the average time-in-grade for all employees eligible for promotion in his/her bureau or office for the same grade and position. A written training and development plan, prepared by the employee's supervisor, will be supplied upon request to each employee at GS-9 or above.

6. All supervisors will be specifically evaluated each year on their efforts to promote equal employment opportunities in hiring, promotions, and work assignments.

7. The Commission will seek to increase minority participation in all training programs. To that end, the Commission will promptly seek from the Civil Service Commission permission to open the Executive Development Program to persons at the GS-12 level.

8. To insure that both current and prospective minority employees are fully utilized and fairly considered for promotion, any minority employee who is eligible for promotion and has not been promoted by the time he/she reaches the average time-in-grade for all non-minority employees eligible for promotion in his/her office or bureau for the same grade and position, may ask to have his/her records reviewed by the Administrator, within thirty (30) days of reaching that average time-in-grade, to insure that the employee received the assignments and/or training required under this Stipulation and has been properly considered for promotion under applicable criteria. The Administrator shall make a determination whether the requirements of this Stipulation have been met and whether he believes that promotion is justified, and shall report his conclusions to the employee, to the head of the office or bureau, and to plaintiffs' counsel. The Administrator's notice shall advise the employee of his or her rights under applicable laws or regulations concerning racial discrimination in employment.

9. If, for any reporting year under Section X of this Stipulation, (a) the average time-in-grade of all minority employees in the Commission's regional offices who are eligible for promotion exceeds by twenty-five percent the average time in-grade for all non-minority employees eligible for promotion in the same grades and positions in such offices, or (b) the average time in-grade of all minority employees in the bureaus and offices at the Commission's headquarters who are eligible for promotion exceeds by twenty-five percent the average time-in-grade for all non-minority employees eligible for promotion in the same grades and positions in such headquarters bureaus and offices, the Administrator will review the records of all minority employees eligible for promotion (in the regional offices or at headquarters, as appropriate) at the grade and position involved who have been in grade twenty-five percent longer than the

non-minority average to insure that the employees received the assignments and/or training required under this Stipulation and have been properly considered for promotion under the applicable procedures. The Administrator shall report his conclusions concerning whether the requirements of this Stipulation have been met and whether or not promotions of such employees are justified, with specific supporting reasons, to the heads of the bureaus or offices involved and to plaintiffs' counsel. Upon request by plaintiffs' counsel, the Administrator shall also conduct such a review and make such a report with respect to particular minority employees eligible for promotion who have been in grade twenty-five percent longer than the non-minority average for employees eligible for promotion in the same grade and position in the same bureau or office.

VIII. *Individual Relief*

1. Any individual filing a claim pursuant to paragraphs 2-4 below shall do so in the form of a sworn written statement setting forth with particularity any facts which he/she believes support his/her claim of racial discrimination. The statement shall set forth the specific manner in which the claimant feels he/she has been discriminated against (*e.g.*, failure to hire or promote, wrongful termination, resignation caused by discrimination). All claimants shall indicate the official or officials responsible for the alleged discrimination, if known, and when and where it occurred. Rejected applicants and former employees shall indicate their qualifications for the position or promotion. If the claimant is aware of documents or witnesses with information relating to the claim, they should be identified.

2. Any individual class member who feels he/she has been discriminated against within the period commencing two years preceding the filing of the complaint in this action because of his/her race, may submit to the Administrator a sworn claim within ninety (90) days of the date of the Court's approval of this Stipulation. The Administrator shall then have thirty (30) days from the filing of the claim to attempt to conciliate the claim. If agreement is reached, the parties will file with the Court a stipulation of dismissal.

3. If, after the period for conciliation, no resolution is reached under subparagraph 2 of this section, the Administrator shall forward the claim file to a Magistrate of this Court who will review the claim and other relevant evidence.

4. If the Magistrate finds the claim has been substantiated, the claimant may be awarded appropriate relief, which may include, *inter alia*, an offer of employment or promotion or reinstatement, if positions are available, and back pay for the period of time beginning when it is determined the discrimination arose, in accordance with

the provisions of applicable laws and regulations. In the case of claims concerning discrimination in promotion, if the claimant shows that he/she was in grade one-third longer (for GS-9 to GS-12 employees) or one-fourth longer (for GS-13 to GS-15 employees) or nine months longer (whichever is less) than the average time-in-grade for all non-minority employees then eligible for promotion at the same grade and position in the bureau or office in which he/she was employed, the Commission shall have the burden of showing a legitimate, non-discriminatory reason why the individual was not promoted, by such evidence as would be required in a case under Title VII in which discrimination has been found.

5. The remedy afforded in the preceding paragraphs is exclusive. It is the understanding of the parties that any individual claim referred to the Magistrate is done with the consent of the parties and that the decision of the Magistrate will provide a final resolution of the claim without any right of appeal.

6. Each claimant shall be entitled to be assisted or represented by plaintiffs' counsel in preparation of his/her claim and in any proceedings before the Administrator and/or Magistrate. However, it is the mutual contemplation of the parties that such proceedings shall insofar as possible be informal in nature and that the parties would ordinarily need not be represented by counsel. The Administrator and/or the Magistrate may provisionally award to a prevailing claimant, reasonable attorney's fees, costs and expenses for services necessarily incurred, subject to court approval pursuant to Section XII of this Stipulation and the limitations therein.

IX. *Notice to Class*

Following the Court's provisional approval of this Stipulation and Order appropriate notice of their terms was given to class members as ordered by the Court. Class members have been given a reasonable opportunity to object thereto at a hearing held on March 27, 1978. Upon further consideration, the Court finally concludes and determines that the Stipulation and Order provide a fair and equitable disposition of this matter for all members of the class.

X. *Reports*

Beginning on December 31, 1978, and by December 31 for each year thereafter until December 31, 1982, the Commission shall file reports with plaintiffs' counsel and the Court covering the preceding fiscal year. The Administrator will be primarily responsible for the preparation of these reports. The reports shall list separately for each group of employees in the occupations covered by this Stipulation the

following information insofar as such information can reasonably be ascertained.

1. *New Hires*

a. Total number of applicants for positions.
b. Total number of applicants interviewed for positions.
c. Total number of minorities interviewed for positions.
d. Total number of offers extended to applicants for positions.†
e. Total number of offers extended to minority applicants for positions.†
f. Total number of offers accepted by applicants for positions.†
g. Total number of offers accepted by minority applicants for positions.†

2. *Promotions*

a. Total number of promotions.†
b. Total number of minority promotions.†
c. Total number of employees at each GS level (by division, bureau or office and by occupation).
d. Total number of minority employees at each GS level (by division, bureau or office and by occupation).

3. *Departures*

a. Total number of employees departing.†
b. Total number of minority employees departing.†
c. For departing minority employees, information about whether the departures were voluntary or involuntary and the reasons given, which does not reflect the identity of any individual.

XI. *Miscellaneous*

1. The plaintiffs and all class members hereby waive, release and covenant not to sue the Commission with respect to the matters which were alleged as charges in this suit involving acts or omissions occurring before the date of the Court's approval of this Stipulation, subject to the performance by defendant of the terms of this Stipulation.

2. This Stipulation is in full and complete disposition of allegations in the complaint and concludes all charges of race discrimination by any members of the class which were made or pending against the Commission either administratively or in court on or before the Court's approval of this Stipulation.

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† By division, bureau or office and by grade.

3. The Commission will maintain resumes and correspondence with applicants for positions covered by this Stipulation for two years after they were received.

4. All information furnished to plaintiffs' counsel is furnished for the exclusive use of plaintiffs' counsel for the purpose of compliance review and is confidential; provided that such reports may be used as evidence in a proceeding to enforce the terms of this Stipulation.

5. The Commission will inquire of departing minority employees to determine if separations are due, or believed to be due, in part to the lack of equal employment opportunity and to determine if and how management practices can be improved.

6. Within thirty (30) days of court approval of this Stipulation, the Chairman of the Commission shall inform each of his fellow Commissioners of the Stipulation in writing and shall encourage them to apply the spirit of this Stipulation in their hiring and promotion decisions. The Chairman will also provide his fellow Commissioners with copies of the annual reports required by this Stipulation.

7. The time periods referred to in this Stipulation may be altered upon agreement of plaintiffs' counsel and counsel for the Commission.

XII. *Costs and Attorney Fees*

The Commission agrees to pay reasonable attorneys' fees, costs and expenses in amounts approved by the Court for work required to be performed by plaintiffs' attorneys (other than those attorneys who, while rendering services, are employed by the government) in monitoring compliance with this Stipulation during the five-year period of its effectiveness (including services performed in connection with successful individual claims pursuant to Section VIII of this Stipulation, but not including any attorney fees, cost or expenses from an unsuccessful challenge to any action by the Commission), subject to a maximum of $7,000 in the first year and $3,000 in each of the four succeeding years. Upon a showing of extraordinary and unforseeable circumstances, plaintiffs' counsel may apply to the Court for an award of attorneys fees, costs and expenses in excess of the foregoing maximums. Within thirty (30) days after the end of each year, plaintiffs' counsel shall submit to the Court an application for an award covering the preceding year, and they shall maintain detailed and specific records of the services rendered.

XIII. *Jurisdiction*

The Court hereby retains jurisdiction of this cause for a period of five years for the purpose of issuing additional orders or decrees need-

ed to effectuate, clarify or enforce the full purpose and intent of this Stipulation. In the event that the Commission's ability or authority to carry out the provisions of this Stipulation is drawn into question by subsequent laws or court decisions, either party shall have the right on due notice to petition the Court for relief from or modification of the terms of this Stipulation.

FEDERAL TRADE COMMISSION v. WINTERS NATIONAL BANK AND TRUST CO.*

Civ. A. No. C-3-78-54 F.T.C. File No. 99-394.

(United States District Court, Southern District of Ohio, Western Division, April 26, 1978)

On a petition for an order compelling a bank to comply with F.T.C.'s investigative subpoenas, court held that, although respondent's contention that only the Comptroller of the Currency could investigate unfair or deceptive banking practices was sound, F.T.C. has the authority to subpoena a bank for information relevant to its investigation of possible violations of its "Holder-in-Due-Course Rule," as long as bank is not the target of the investigation, and subpoenas meet the test set forth by the Supreme Court in *United States v. Morton Salt Company*. That test compels subpoena enforcement if the demand is not so indefinite as to constitute an undue burden and the information sought is reasonably relevant to agency's lawful inquiry. Since F.T.C.'s inquiry meets the *Morton Salt* test, enforcement of subpoena should be granted.

Judgment issued accordingly.

Before RUBIN, *District Judge*.

FINDINGS OF FACT, OPINION AND CONCLUSIONS OF LAW

This matter is before the Court following the filing of memoranda and the presentation of oral arguments. Plaintiff, the Federal Trade Commission (Commission), seeks an order requiring Winters National Bank and Trust Co. (Winters), to appear, testify and produce documents in a Federal Trade Commission investigation. In accordance with Rule 52 of the Federal Rules of Civil Procedure, the Court does submit herewith its Findings of Fact and Conclusions of Law.

I

Findings of Fact

I. In May of 1976 the Commission issued a rule concerning the preservation of consumers claims and defenses, 16 C.F.R. § 433. This rule is commonly referred to as the "Holder-in-Due-Course Rule." On October 20, 1976, the Commission determined to conduct an investigation "to determine whether unnamed persons, partnerships, or corporations engaged in the sale or lease of goods or services to consumers have been or are engaged in unfair or deceptive acts or practices in violation of 16 C.F.R. § 433 and Section 5 of the Federal

*Not reported in Federal Reporter. Reported in Trade Reg. Rep. ¶ 62,089 at 74,751 (1978-1 Trade Cases).

Trade Commission Act (15 U.S.C. § 45), in connection with the advertising, promotion, offering for sale or lease, sale, lease or distribution in or affecting commerce of goods or services to consumers. Such investigation shall in addition determine whether Commission action to obtain customer redress would be in the public interest" (Plaintiff's Exhibit 1 to complaint).

2. Pursuant to such resolution, an inquiry was begun on a national scale from the Denver Regional Office of the Commission. A primary, but not exclusive, inquiry was directed to the mobile home industry. In the process of investigation the Commission learned that a company known as Caboose Mobile Homes, located in Cincinnati, Ohio, utilized a contract form lacking appropriate notice as required by the Holder-in-Due-Course Rule. Such form may have been prepared by defendant Winters.

Although requested so to do, Winters declined to supply information regarding such form to the Commission, and suit to compel production of such information was brought in the United States District Court for the District of Colorado. That action was dismissed without prejudice after Winters asserted that venue for such an action could only be in the Judicial District wherein it had its headquarters.

A subpoena *duces tecum* was served upon Winters on November 18, 1977, containing seven specifications of documents requested. By agreement, on December 9, 1977, Specification 1-C and 7 were withdrawn and Specification 6 was amended. Winters declined to comply with such amended subpoena and this action was thereupon commenced.

3. Investigative powers and limitations thereon of the Commission may be found in 15 U.S.C. § 46. It provides in part as follows:

> The Commission shall also have power
> (a) To gather and compile information concerning and to investigate from time to time the . . . conduct, practices . . . of any corporation engaged in commerce, excepting banks and common carriers . . . .

Subsection (h) of Section 46, as amended November 16, 1973, Public Law 93-153, provides in part as follows:

> (h) Provided that the exception of "banks and common carriers subject to the Act to regulate commerce" from the Commission's powers defined in clauses (a) and (b) of this section shall not be construed to limit the Commission's authority to gather and compile information . . . or to require reports or answers from any . . . corporation to the extent that such action is necessary to the investigation of any person . . . corporation . . . or industry which is not engaged or is engaged only incidentally in banking . . . .

15 U.S.C. § 49 provides in part as follows:

> For the purposes of Section 41 to 46 . . . of this Title . . . the Commission shall have power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation .. . .

15 U.S.C. § 57a was amended by Public Law 93-637, effective January 4, 1975. Subsection (f)(1) provides in part as follows:

> In order to prevent unfair or deceptive acts or practices in or affecting commerce . . . by banks, each agency specified in paragraph (2) of this subsection shall establish a separate division of consumer affairs . . . . Whenever the Commission [Federal Trade Commission] prescribes a rule under subsection (a)(1)(B) of this section, then within 60 days after such rule takes effect, such Board [Board of Governors of the Federal Reserve System] shall promulgate substantially similar regulations prohibiting acts or practices of banks which are substantially similar to those prohibited by rules of the Commission . . .

Subsection (f)(2) provides in part as follows:

> Compliance with regulations prescribed under this subsection shall be enforced under section 1818 of Title 12 in the case of—
> (A) national banks . . . by the Division of consumer affairs established by the Comptroller of the Currency

No regulations for the purpose of carrying out 15 U.S.C. § 57a(f)(1) have been prescribed by the Board of Governors of the Federal Reserve System as of the date of the filing of the complaint herein.

II

Opinion

The conflicting positions of the parties each may be supported by reference to an appropriate section of the United States Code. The Commission asserts that it has authority to conduct an investigation under 15 U.S.C. § 46 and to require the production of information from the defendant herein under 15 U.S.C. § 49.

Defendant Winters asserts that the Commission may not investigate banks under 15 U.S.C. § 46 and that only the Comptroller of the Currency may investigate unfair or deceptive acts by banks in accordance with 15 U.S.C. § 57a(f)(1). Defendant's position is a sound one, although plaintiff's counsel categorically denied any attempt by the Federal Trade Commission to "investigate" the defendant.

The Court is thus faced with a problem of semantics, since information relevant to an "inquiry" is obtainable from a bank under § 49 while information relevant to an "investigation" of such bank under 57a is not.

The United States District Court for the Southern District of New York was called upon to enforce compliance with a Commission subpoena issued to officials of banks in the case of *Federal Trade Commission* v. *Rockefeller, et al.,* 441 F.Supp. 234 (S.D.N.Y. 1977). The Honorable Morris E. Lasker, in a carefully reasoned, scholarly opinion, applied to the Commission's subpoena a test originally set forth by the Supreme Court of the United States in *United States* v. *Morton Salt Company,* 338 U.S. 632 (1950). *Morton Salt* provides a three-prong test. It holds that compliance must be ordered if, and only if: [1] the inquiry is within the authority of the agency; [2] the demand is not too indefinite; and [3] the information sought is reasonably relevant.

Defendant denies that *Rockefeller* is applicable herein, first because it dealt with an investigation of banking involvement in the energy industry; and second, because it did not consider the position asserted by defendant; namely, that only the Comptroller of the Currency may conduct an inquiry into deceptive or unfair consumer practices by banks.

Defendant's position while facially persuasive, would require this Court to assume that it was Congressional intent for an inquiry into commercial transactions such as this to be bifurcated. Were this the case, the Commission could interrogate sellers of commercial paper but could not interrogate bank purchasers of such commercial paper, even though such purchasers were not the objects of an investigation. To indicate such intent, Section 57a(f)(1) must be deemed to supersede Section 49. It may not do so by implication, however, since repeal by implication has universally been disapproved. *Radzanower* v. *Touche Ross & Co.,* 426 U.S. 148 (1976); *United States* v. *United Continental Tuna Corp.,* 425 U.S. 164 (1976); *Rosados* v. *National City Bank,* 296 U.S. 497 (1936). Nothing in the legislative history of 57a leads to such a conclusion.

While jurisdictional divisions between federal agencies are not unknown, one should not be assumed. Neither 57a itself, nor its legislative history, support the assertion that Congress intended to reduce the investigative powers of the Commission. To the contrary, an examination of the legislative reports indicate a broadening rather than a reduction of the Commission's authority.[1]

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[1] The legislative history of Pub.L. 93-637, which became 57a, may be found on pp. 7702-7774, Vol. 4, U.S. Code Congressional & Administrative News, 93rd Congress, 2nd Session. The committee reports contain the following pertinent statements: "This section [201-Jurisdiction of the Commission] amends sections . . . of the Federal Trade Commission Act *so as to expand the FTC's jurisdiction* from acts and practices 'in' interstate commerce to those 'in or affecting' interstate commerce (p. 7726).

"The amendments made by Section 201 will permit *more effective regulation of the marketplace by the FTC* (p.7726).

"Under the existing provisions . . . of the Federal Trade Commission Act, the FTC investigative powers and authority to obtain reports and documentary evidence . . . are limited to corporations . . . sections . . . of the Act are amended by substituting 'person, partnership or corporation' wherever the term 'corporation' is used" (pp. 7730-7731) (emphasis added).

Applying the *Morton Salt* test, it is clear that an inquiry into the Holder-in-Due-Course Rule, 16 C.F.R. § 433, is appropriate for the Commission.

An examination of the specifications of the amended subpoena *duces tecum* do not at this point appear to create an unreasonable burden, and the information sought is reasonably relevant. This holding, however, does not foreclose defendant from establishing at a later date that the inquiry is an unreasonable burden and in such event appropriate relief will be granted.

The inquiry in question therefore meets the test of *Morton Salt*, and enforcement of the Commission's subpoena is hereby GRANTED.

III

Conclusions of Law

(A) This Court has jurisdiction in accordance with 15 U.S.C. § 49.

(B) Where an agency of the United States seeks information from a national bank, the United States District Court in the judicial district containing the headquarters of such bank is the court within whose jurisdiction an inquiry is carried on, even though such inquiry may have originated in another judicial district. *F.T.C.* v. *Browning*, 435 F.2d 96 (D.C.Cir. 1970); *F.T.C. v. McArthur*, 532 F.2d 1135 (7th Cir. 1976).

(C) The Federal Trade Commission may obtain information from a national bank by subpoena *duces tecum* in accordance with 15 U.S.C. § 49 so long as such bank itself is not the subject of investigation.

(D) Where, as here, the inquiry in question is within the authority of the Federal Trade Commission, the subpoena demand is not so indefinite that it amounts to an unreasonable burden, and the information sought is reasonably relevant, enforcement of such subpoena should be ordered. *United States* v. *Morton Salt Company*, 338 U.S. 632; *F.T.C.* v. *Rockefeller*, 441 F.Supp. 234 (S.D.N.Y. 1977).

(E) The request of plaintiff for an order requiring Winters National Bank and Trust Company to appear, testify and produce documents in a Federal Trade Commission investigation should be and it is hereby Granted. Said Winters National Bank and Trust Company is directed to appear before the Federal Trade Commission to testify and produce documents in accordance with the subpoena *duces tecum* issued November 18, 1977, as modified by letter dated Dec. 9, 1977.

Let Judgment Issue in Accordance with the Foregoing.

FEDERAL TRADE COMMISSION
v.
W.L. WEARLY and INGERSOLL-RAND COMPANY*

Misc. No. 78-0048. F.T.C. File No. 99-391.

(United States District Court, District of Columbia, April 27, 1978)

Court issued an order enforcing FTC's subpoena duces tecum holding that the subpoena was (a) within the Commission's authority; (b) not too indefinite; and (c) the demanded information was reasonably relevant.

Before RICHEY, *District Judge.*

ORDER

Petitioner, the Federal Trade Commission, having invoked the aid of this Court, pursuant to 15 U.S.C. (Supp. V) § 49, in requiring the above-named respondents to comply with an administrative subpoena *duces tecum* issued by petitioner in a nonpublic investigation being conducted by petitioner, and the Court having considered the verified Petition and other papers of record, and the Court finding that the subpoena is within petitioner's authority, that the information demanded by the subpoena is not too indefinite and is reasonably relevant, and the Court being of the opinion that the relief sought by petitioner should be granted, it is hereby

ORDERED that respondents appear before a duly designated representative of petitioner at a time and place in the District of Columbia, to be designated by petitioner upon not less than ten (10) days' notice and then and there to testify and produce documents in accordance with a Federal Trade Commission subpoena issued on September 16, 1977, a copy of which is attached to the Petition as Exhibit 2, as modified by the revised subpoena specifications, a copy of which is attached to the Petition as Exhibit 8.

Failure to comply with the terms and conditions of this order shall constitute a contempt of this Court.

IT IS FURTHER ORDERED that a certified copy of this Order be served upon respondents by the United States Marshal.

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*Not otherwise reported. *Affirmed*, 598 F.2d 310 (1979).

RUBBERMAID, INCORPORATED v. FEDERAL TRADE COMMISSION*

No. 76-1830. F.T.C. Docket No. 8939.

(United States Court of Appeals, Sixth Circuit, May 4, 1978)

1. REPEAL OF STATUTORY EXEMPTION DID NOT RENDER CASE MOOT, NOR AFFECT THE VALIDITY OF FTC ORDER FOUNDED ON PAST VIOLATIONS OF STATUTE STILL IN EFFECT.

   Manufacturer's appeal from decision of Federal Trade Commission finding that agreements entered into between manufacturer and wholesalers violated Sherman Act and Federal Trade Commission Act was not rendered moot as result of repeal of statute which allegedly exempted agreements from antitrust laws, in view of fact that Commission's cease and desist order was based on alleged violations of statutes still in effect, and if violation occurred in past, repeal of statutory exemption did not affect validity of Commission's order.

2. ABSENT A SETTLEMENT BETWEEN PARTIES, LAWSUIT ORDINARILY IS NOT RENDERED MOOT BECAUSE ONE SIDE GIVES UP.

   Lawsuit does not ordinarily become moot because one side gives up, unless the parties have agreed on a settlement.

3. ONLY CERTAINTY OF NONRECURRENCE, NOT DISCONTINUANCE OF PAST ILLEGAL PRACTICES, MAY RENDER MOOT ACTION SEEKING TO ENJOIN SIMILAR FUTURE MISCONDUCT.

   While a suit to enjoin future illegal action may be moot if it is certain that such violations cannot recur, it is likewise well established that discontinuance of past illegal practices does not necessarily render moot a controversy over an injunction against similar future actions.

4. UNLESS COMMISSION HAS CLEARLY ABUSED ITS DISCRETION, APPELLATE COURT CANNOT DISTURB AGENCY'S FINDING OF PROBABLE FUTURE MISCONDUCT.

   A Federal Trade Commission finding that future illegal conduct is likely cannot be disturbed by Court of Appeals unless Commission has clearly abused its discretion; a company bears a heavy burden in showing that past conduct will not be repeated.

5. CONTRACTS BETWEEN WHOLESALERS AND MANUFACTURER, IN ITS WHOLESALING CAPACITY, WERE NOT EXEMPTED BY FAIR TRADE LAWS AND WERE ILLEGAL UNDER ANTITRUST LAWS.

   Contracts entered into between wholesalers and manufacturer which also acted as a wholesaler, which contracts required wholesalers to sell, in states with fair trade laws, only to retailers that had executed fair trade agreements with manufacturer were illegal under antitrust laws, and were not exempt by terms of statute which, at time contracts were entered into, exempted contracts prescribing minimum or stipulated prices, or requiring vendee to enter into contracts or agreements prescribing minimum or stipulated prices, for the resale of a commodity.

6. ALTHOUGH FTC HAS WIDE LATITUDE IN FORMULATING PROPER REMEDIES FOR ANTITRUST LAW VIOLATIONS, AN ORDER WHICH

*Reported in 575 F.2d 1169 (1978). For case before the Commission, see 87 F.T.C. 676, *modified* 92 F.T.C. 324.

IS NOT IN THE PUBLIC INTEREST MAY BE MODIFIED BY APPELLATE COURT.

Once a violation of antitrust laws has been shown Federal Trade Commission has wide latitude in formulating appropriate remedies; however, Court of Appeals may modify Commission order which is not in the public interest.

7. SINCE IMPOSED REQUIREMENTS WERE REASONABLY RELATED TO THE NATURE AND POSSIBLE CONTINUING EFFECTS OF VIOLATIONS FOUND, FTC ORDER WAS NOT OVERLY BROAD.

Cease and desist order issued by Federal Trade Commission following decision holding that agreements entered into between manufacturer and wholesalers violated antitrust laws was not unreasonably broad, notwithstanding fact that Commission's order addressed a broader set of practices than specific violations which were found, in view of fact that all requirements imposed by order were reasonably related to nature of violations found and to possible continuing effects of violations.

Manufacturer and wholesaler of household products appealed from decision of Federal Trade Commission finding that manufacturer had violated Sherman Act and Federal Trade Commission Act. The Court of Appeals, Merritt, *Circuit Judge*, held that: (1) contracts entered into between wholesalers and manufacturer which also acted as a wholesaler, which contracts required wholesalers to sell, in states with fair trade laws, only to retailers that had executed fair trade agreements with manufacturer, were illegal under antitrust laws, and were not exempt by terms of statute which, at the time contracts were entered into, exempted contracts prescribing minimum or stipulated prices, or requiring a vendee to enter into contracts or agreements prescribing minimum or stipulated prices, for the resale of a commodity, and (2) cease and desist order issued by Federal Trade Commission was not unreasonably broad.

Affirmed.

(Syllabus, with substituted captions, taken from 575 F.2d 1169)

Norman Diamond, David Bonderman, Arnold & Porter, Washington, D.C., for petitioner.

Robert J. Lewis, Gen. Counsel, F.T.C., *W. Baldwin Ogden, Jr., Gerald Harwood,* Washington, D.C., for respondent.

Before PECK and MERRITT, *Circuit Judges,* and THORNTON, *District Judge.**

MERRITT, *Circuit Judge.*

This appeal raises a rather narrow and technical question concerning the scope of an exception to the anti-trust laws allowing resale price maintenance, a question not likely to arise again because Congress has now prohibited resale price maintenance altogether by repealing the McGuire and Miller-Tydings Acts.[1] The petitioner Rubbermaid, Inc., seeks review of a decision and order of the Federal Trade Commission. In 1973 the Commission filed a complaint alleg-

*Honorable Thomas P. Thornton, Senior Judge, United States District Court for the Eastern District of Michigan, sitting by designation.

[1] 66 Stat. 631-32 (1952), *formerly* 15 U.S.C. §§ 45(a)(2)-(a)(5), *repealed* 89 Stat. 801 (1975); 50 Stat. 693-94 (1937), *formerly* 15 U.S.C. § 1, *repealed* 89 Stat. 801 (1975).

ing that Rubbermaid had violated Section 1 of the Sherman Act, 15 U.S.C. § 1, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, by entering into certain agreements with wholesalers who marketed Rubbermaid products. The agreement served to maintain prices at the retail level. On cross motions for summary decision, the Administrative Law Judge found in favor of the Commission. The Commission affirmed the decision and issued an order to cease and desist. Rubbermaid claims that the agreements in question were exempt from the general antitrust laws under the fair trade provisions of the McGuire Act until it was repealed in 1975. Rubbermaid further claims the the case is now moot, in light of the repeal of the McGuire Act and the company's discontinuance of the practices in question. Finally, it says that even if a violation occurred, the Commission's order is too broad and burdensome.

I. Statement of the Case

The underlying facts are not in dispute. Rubbermaid, a manufacturer and wholesaler of rubber, plastic, and coated wire household products, had a fair trade program until July 1, 1975. It sold Rubbermaid products directly to retailers and also to other wholesalers. The *retail* contracts stipulated that where legal under state law, the retailers would maintain fair trade prices established by Rubbermaid in reselling Rubbermaid's goods to consumers. The *wholesale* contracts did not directly restrict the wholesalers' freedom to set their own resale prices, but imposed "customer restriction requirements" which bound the wholesalers to sell, in states with fair trade laws, only to retailers which had executed Rubbermaid fair trade agreements.

The Commission's complaint was addressed solely to the customer restriction requirements in the wholesale contracts. The provisions were alleged to be illegal on the grounds that they were horizontal agreements which restricted the wholesaler's right to deal and were designed to fix prices at the retail level.

Rubbermaid argues that the McGuire Act exempted from the general antitrust laws Rubbermaid's entire fair trade program and that the "vendee clause," italicized below, specifically exempted the company's wholesale contracts. 15 U.S.C. § 45(a)(2) provided:

> Nothing contained in this section or in any of the Antitrust Acts shall render unlawful any contracts or agreements prescribing minimum or stipulated prices, *or requiring a vendee to enter into contracts or agreements prescribing minimum or stipulated prices,* for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Co-

lumbia in which such resale is to be made, or to which the commodity is to be transported for such resale. [Emphasis added.]

The Commission found that this exemption did not apply to Rubbermaid's wholesale contracts, relying on the proviso which was set forth in 15 U.S.C. § 45(a)(5):

Nothing contained in paragraph (2) of this subsection shall make lawful contracts or agreements providing for the establishment or maintenance of minimum or stipulated resale prices on any commodity referred to in paragraph (2) of this subsection, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other.

It is undisputed that Rubbermaid's wholesale contracts violated the antitrust laws unless the contracts fell under the fair trade exemption of the McGuire Act.[2] Whether a violation occurred therefore turns solely on the availability of that exemption, as qualified by the proviso. Before reaching the merits of this issue, however, we must first address Rubbermaid's claim that the repeal of the McGuire Act has mooted the proceedings.

II. Mootness

[1] We do not agree that the repeal of the McGuire Act renders this case moot. The Commission's cease and desist order was based on an alleged violation of 15 U.S.C. §§ 1 and 45(a)(1).[3] These provisions remain in effect. If a violation occurred in the past, the repeal of the McGuire Act exemption does not affect the validity of the Commission's order or this Court's duty to enforce it.[4] Rubbermaid has lost a plausible defense for the future, but the Commission has not lost any cause of action based on past violations. If Rubbermaid's contracts were unlawful at the time that the exemption was available, then they would be even more clearly illegal now that the exemption has been repealed.

Rubbermaid relies on *Diffenderfer v. Central Baptist Church*, 404 U.S. 412, 92 S.Ct. 574, 30 L.Ed.2d 567 (1972) in claiming that this case is moot. There, plaintiff challenged as unconstitutional a statutory exemption which was subsequently repealed. The Supreme Court held the issue of constitutionality to be a moot question and

[2] *See e.g., United States v. Container Corp.*, 393 U.S. 333, 337, 89 S.Ct. 510, 21 L.Ed.2d 526 (1969); *Simpson v. Union Oil Co.*, 377 U.S. 13, 16-22, 84 S.Ct. 1051, 12 L.Ed.2d 98 (1964); *United States v. Bausch & Lomb Optical Co.*, 321 U.S. 707, 721, 64 S.Ct. 805, 88 L.Ed. 1024 (1944); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 221-23, 60 S.Ct. 811, 84 L.Ed. 1129 (1940).

[3] Section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1) (1976), provides: "Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful." Section 1 of the Sherman Act, 15 U.S.C. § 1 (1976), provides: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."

[4] *See F.T.C. v. Goodyear Tire & Rubber Co.*, 304 U.S. 257, 259-60, 58 S.Ct. 863, 82 L.Ed. 1326 (1938).

dismissed the case. Here, on the other hand, it is the Commission's order, not the repealed exemption which is the subject of Rubbermaid's lawsuit; Rubbermaid, in fact, relies on the repealed exemption to justify its former conduct, while the Commission's order is founded on other, unrepealed, provisions of the law. Rubbermaid has lost a future defense, but that does not end the present dispute.

[2] Rubbermaid makes several further arguments based on the repeal of the McGuire Act, but its central contention may be simply stated. In essence, Rubbermaid says its fair trade practices have all been discontinued with the repeal of the McGuire Act and that there is no need for any further remedy. But a lawsuit does not ordinarily become moot because one side gives up, unless the parties have agreed on a settlement.

[3] While a suit to enjoin future illegal action may be moot if it is certain that such violations cannot recur, it is likewise well-established that discontinuance of past illegal practices does not necessarily render moot a controversy over an injunction against similar future actions. *See, e.g., United States v. Concentrated Phosphate Export Ass'n,* 393 U.S. 199, 202-03, 89 S.Ct. 361, 21 L.Ed.2d 344 (1968); *United States v. W.T. Grant Co.,* 345 U.S. 629, 633, 73 S.Ct. 894, 97 L.Ed. 1303 (1953); *Doherty, Clifford, Steers & Shenfield, Inc. v. F.T.C.,* 392 F.2d 921, 927 (6th Cir. 1968); *Carter Products, Inc. v. F.T.C.,* 323 F.2d 523, 531 (5th Cir. 1963). The crucial question, of course, is to what degree one can be certain that the same or related practices will not recur. Here, the Commission, having found that illegal acts had occurred in the past, further concluded that there was at least some possibility of similar future acts from which the public should be protected. The Commission may be properly concerned not only with the open and formal implementation of agreements exactly like those entered into in the past, but also with the possibility that past unlawful conduct will be perpetuated in some more subtle form in the future.[8] Here, the Commission does not merely seek an end to Rubbermaid's formal fair trade program, nor does the Commission simply ask that Rubbermaid's customers be informed that the fair trade program is no longer in effect. The Commission seeks to preclude through imposition of specific requirements any of a variety of anticompetitive effects similar to those allegedly used in the past, as well as to impose remedial measures to counteract the effects of past practices.

[8] "If the Commission is to attain the objectives Congress envisioned, it cannot be required to confine its roadblock to the narrow lane the transgressor has traveled; it must be allowed effectively to close all roads to the prohibited goal, so that its order may not be by-passed with impunity." *F.T.C. v. Ruberoid Co.,* 343 U.S. 470, 473, 72 S.Ct. 800, 803, 96 L.Ed. 1081 (1952); *see also Doherty, Clifford, Steers & Shenfield, Inc.,* 392 F.2d 921, 926 (6th Cir. 1968).

[4] A company bears a heavy burden in showing that past conduct will not be repeated. *United States v. W.T. Grant Co.*, 345 U.S. 629, 633, 73 S.Ct. 894, 97 L.Ed. 1303 (1953); *United States v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 203, 89 S.Ct. 361, 21 L.Ed.2d 344 (1968). Moreover, a Commission finding that future illegal conduct is likely cannot be disturbed by this court unless the Commission has clearly abused its discretion. We decline to find that the likelihood of similar conduct in the future is so remote that the present case is moot.

III. Violation of the Antitrust Laws

[5] At the time the Rubbermaid wholesale contracts were in effect, the McGuire Act established an exemption from the antitrust laws for "contracts or agreements prescribing minimum or stipulated prices, or requiring a vendee to enter into contracts or agreements prescribing minimum or stipulated prices, for the resale of a commodity." However, this exemption explicitly did not apply to "contracts or agreements providing for the establishment or maintenance of mimimum or stipulated resale prices on any commodity . . . between wholesalers . . . or between persons, firms, or corporations in competition with each other." Rubbermaid concedes that it acted as a wholesaler as well as a manufacturer and that it sold its products to competing wholesalers. Its wholesale contracts were clearly "contracts or agreements . . . between wholesalers."[6] The central question, therefore, is whether Rubbermaid's wholesale contracts provided for the "establishment or maintenance of minimum or stipulated resale prices." The wholesale contracts did not prescribe the wholesaler's resale prices but rather required a boycott of retailers that did not adhere to fixed prices. Thus the contract was a horizontal agreement between wholesalers, but the purpose was to fix prices at the retail level. Rubbermaid contends that the statutory proviso, in referring to "resale prices," addresses only the resale prices of the contracting parties, not the resale prices of third parties to whom the goods are sold.

Both parties rely on the nature of the modifications made by the McGuire Act in the Miller-Tydings Act.[7] The McGuire Act modified

[6] Rubbermaid contends that "between wholesalers" modifies "resale prices," rather than "contracts or agreements." This is a strained reading in our view, and contrary to the plain meaning of the section.

[7] The Miller-Tydings Act, 50 Stat. 693-94 (1937), *formerly* 15 U.S.C. § 1, *repealed* 89 Stat. 801 (1975), qualified § 1 of the Sherman Act as follows:

> *Provided*, That nothing contained in sections 1 to 7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further*, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other.

the earlier Act's fair trade exemption to include a "vendee clause," so that the exemption would apply not simply to contracts or agreements "prescribing . . . prices" but also explicitly to agreements "requiring a vendee to enter into contracts or agreements prescribing minimum or stipulated prices." The legislative history suggests that Congress intended to clarify, not to change, the exemption by adding the vendee clause, and that the notion of "prescribing prices" was originally intended to encompass the customer boycott arrangements subsequently described in the vendee clause.[8]

The proviso in the Miller-Tydings Act which withdrew agreements between competitors from the scope of the exemption was not amended by the McGuire Act to include a vendee clause. The original proviso referred to "establishment or maintenance" of resale prices rather than to agreements "prescribing" prices. This language remained unchanged in the McGuire Act.

Rubbermaid argues that Congress' failure to include a vendee clause in the proviso manifests a specific intent to exclude customer restriction requirements from its scope. It contends, in other words, that the McGuire Act made agreements between competitors illegal if the purpose was to fix the competitors' prices, but legal if the purpose was to arrange a boycott of retailers that refused to adhere to fixed prices.

We cannot accept this interpretation. An ordinary reading of the proviso indicates that it was intended to cover all of the types of price fixing agreements referred to in the exemption, and to withdraw them from the exemption if made between competitors. The emphasis in the proviso is on the identity of the contracting parties. This interpretation is faithful to the plain meaning of the McGuire Act, the intent of Congress in formulating a fair trade exemption, and the general policies of the antitrust laws. In passing the McGuire Act, Congress intended to make legal certain vertical arrangements in order to give a manufacturer power over the ultimate market prices of its products. However, Congress also made clear in the proviso that by establishing an exception for these specific vertical agreements, it in no way intended to countenance horizontal arrangements, even if made for the same or similar purposes. The agreements with wholesalers in this case were horizontal restraints which limited the wholesalers' freedom to sell to any customers they chose. The agreements meant that the wholesalers could compete with Rubbermaid only on Rubbermaid's terms.

The basic issue is whether the general purpose of the McGuire Act exemption—to allow a vendor to control the ultimate consumer prices

[8] *See* Hearings on H.R. 5767 Before a Subcomm. of the House Comm. on Interstate and Foreign Commerce, 82d Cong., 2d Sess. 174, 221 (1952); *see also, Sunbeam Corp.* v. *Payless Drug Stores*, 113 F.Supp. 31, 39-40 (N.D.Cal. 1953).

of its products—was so broad that it would allow two wholesalers to agree on common policies and to work together in order to maintain prices at the retail level. We think that the exemption was not meant to have such broad anti-competitive implications, and that the purpose of the proviso was to specifically prevent the exemption from having horizontal repercussions. As the repeal of the McGuire Act suggests, the free market principle is a more stable concept in our law than resale price maintenance, and it should be preferred in case of doubt.

Consequently, we must conclude that Rubbermaid's agreements with other wholesalers were illegal under the antitrust laws and were not exempt at the time they were made by the terms of the McGuire Act.

IV. Remedy

[6] Once a violation of the antitrust laws has been shown, the Commission has wide latitude in formulating an appropriate remedy.[9] However, it is also well-established that the Court of Appeals may modify a Commission order which is not in the public interest.[10] We must therefore consider what the possible danger to the public interest is and whether the scope and severity of the Commission's order is related to the danger presented.

[7] On the one hand, there appears to be no dispute that Rubbermaid abandoned its formal fair trade program with respect to both wholesalers and retailers in 1975, and that it does not intend to resume such a program now that the McGuire Act, which formerly provided a justification for vertical price-fixing, has been repealed. On the other hand, the Commission could reasonably conclude that Rubbermaid's original violation raised the suspicion that it might in more subtle ways seek to perpetuate agreements which would serve to maintain the resale prices of Rubbermaid goods. This is particularly true because Rubbermaid did not discontinue its wholesale agreements until well after the Commission's complaint was filed. Moreover, it is reasonable to conclude that the effects of Rubbermaid's illegal agreements with wholesalers may tend to be perpetuated in practice unless affirmative measures are taken to eradicate them.

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[9] *E.g., United States v. E. I. de Nemours & Co.*, 366 U.S. 316, 334, 81 S.Ct. 1243, 6 L.Ed.2d 318 (1961); *F.T.C. v. Mandel Bros.*, 359 U.S. 385, 392-93, 79 S.Ct. 818, 3 L.Ed.2d 893 (1959); *Jacob Siegal Co. v. F.T.C.* 327 U.S. 608, 611-13, 66 S.Ct. 758, 90 L.Ed. 888 (1946).

[10] Some courts have held, in particular, that an order should be limited to prohibiting the specific type of activity which was involved in the original violation if the danger of recurrent violations is extremely slim. *E.g., R.H. Macy & Co. v. F.T.C.*, 326 F.2d 445, 450 (2d Cir. 1964); *Country Tweeds, Inc. v. F.T.C.* 326 F.2d 144, 149 (2d Cir. 1964); *Grand Union Co. v. F.T.C.*, 300 F.2d 92, 100 (2d Cir. 1962); *Swanee Paper Corp. v. F.T.C.* 291 F.2d 833, 838 (2d Cir. 1961), *cert. denied*, 368 U.S. 987, 82 S.Ct. 603, 7 L.Ed. 2d 525 (1962).

The Commission's order addresses a broader set of practices than the specific violations which were found. It prohibits price maintenance agreements with retailers as well as with wholesalers, and it prohibits a wide variety of possible coercive actions by Rubbermaid to induce resale price maintenance. However, we find that all of the requirements imposed are reasonably related to the nature of the violations found and to possible continuing effects of those violations. We also conclude that the dangers of subtle efforts at price maintenance in the future are not so remote that the Commission's order should be found to be unreasonably broad.

UNITED STATES v. READER'S DIGEST ASSOCIATION, INC.*

Civ. A. No. 75-184. F.T.C. Docket No. C-2075.

(United States District Court, District of Delaware, May 4, 1978)

In a civil penalties action charging a publisher with violating an F.T.C. consent order proscribing the use or distribution of materials simulating checks or other items of value, court denied defendant's discovery motion seeking to probe deposed Commission attorneys' thought processes, interpretations, and opinions of the admittedly subjective order. Since only Commission-approved staff interpretations (made known to the defendant) were legally pertinent to the issues, court held that sought testimony could scarcely lead to admissible evidence of publisher's good faith. Further, publisher was not entitled to information developed by attorneys in anticipation of litigation, since defendant had failed to make any showing of substantial need. However, it is the court that must decide whether F.T.C.'s order embraced the challenged advertising materials. Reasons for F.T.C.'s institution of the action were irrelevant.

Before LATCHUM, *Chief Judge.*

ORDER DENYING DEFENDANT'S RULE 37 MOTION

The Court having considered (1) defendant's motion to compel two Federal Trade Commission attorneys, who were deposed by the defendants, to give further answers to certain propounded questions to which they either objected or, according to defendant, gave insufficient responses (Docket Item 22), (2) the parties' briefs (Docket Items 26, 29 & 30), and (3) the oral arguments of opposing counsel, it is

Ordered that defendant's Rule 37 motion to compel answers to questions to be propounded at a continuation of these depositions is hereby denied.

Reasons: The principal issue in this civil penalty action is whether defendant violated a consent order it entered into with the FTC that prohibits defendant from:

> Using or distributing simulated checks . . . or . . . any confusing simulated item of value. Docket Item I, par. 6.

Defendant contends that the terms "simulated check" and "confusingly simulated item of value" are vague and subjective.

In its brief defendant states that

> The FTC has admitted that the prohibition in Paragraph IIC(3), which Reader's Digest has allegedly violated, is not objective, and that Reader's Digest *"will have to deal with staff interpretations as approved by the Commision."* Docket Item 30, p. 22 (emphasis in original).

*Not reported in Federal Reporter. Reported in Trade Reg. Rep. ¶ 62,099 at 74,821 (1978-1 Trade Cases). For case before the Commission, see 79 F.T.C. 696; *Modified* 83 F.T.C. 1356.

Seeking to determine (1) whether the FTC staff applied any objective criteria in deciding that its advertising materials violated the consent order, (2) what interpretations of the clause of the consent order in question were held by the FTC and/or its staff and (3) why and how the FTC and/or its staff decided to seek civil penalties in this particular case,[1] defendant noticed the deposition of two staff attorneys of the FTC who were involved in the compliance proceedings with respect to the above mentioned consent order. Although the FTC authorized the two attorneys to testify, they were instructed to testify only "as to those matters which are part of the public record or which relate specifically to communications between Commission staff and defendant and of which [they] have actual knowledge." Defendant argues that the FTC has improperly precluded it from inquiring into several areas by so restricting the testimony of these two witnesses. The FTC has attempted to justify the restrictions on the grounds of (1) the so-called "official government information privilege," (2) attorney work-product privilege, and (3) relevance. Because this Court finds the last two reasons asserted are sufficient to justify the government's refusal to authorize testimony going beyond the areas specified, it is unnecessary to consider the applicability of any official information privilege.

Under Rule 26, F.R.Civ.P., a party may overcome a relevancy objection to a discovery request by showing that "the information sought appears reasonably calculated to lead to the discovery of admissible evidence." Defendant has not met this burden. One issue to which the defendant contends the personal opinions of the two witnesses are relevant is the meaning of the admittedly subjective consent order. Therefore, defendant asked Mr. Ryder, one of the FTC attorneys, what the paragraph in question of the consent order meant to him personally and the criteria he used in determining whether or not an advertising document was within the proscriptions of that paragraph. After noting an objection on grounds of irrelevance, Mr. Ryder responded that he referred back to two examples in the complaint in the action which gave rise to the consent order and relied upon them, the language of the order, and his own subjective ideas about what it meant to determine whether a particular document violated the order.[2] Despite the apparent reasonableness of this response, defendant seeks to probe further into the interpretations and thought processes of staff attorneys of the FTC. The usefulness of such an inquiry generally is doubtful, but it is especially so in this case because only the "staff interpretations *as approved by the Com-*

[1] Docket Item 26, exh. A.

[2] Ryder Dept., Docket Item 27, pp. 14-23.

mission" and made known to Reader's Digest are legally germane to the issues in this case. More importantly, it is the Court which must decide whether the advertising materials at issue were covered by the order. The Court will make that decision based on the language of the order, the complaint which gave rise to it, the challenged materials, and, to the extent they may be relevant, any communications between the staff of the FTC and Reader's Digest. Why or how the FTC decided to institute this civil penalty action is absolutely irrelevant.

Defendant also contends that if the Court decides to assess a civil penalty in this case, the purportedly privileged information it seeks will be relevant to establishing its own good faith as a mitigating factor. The good faith of Reader's Digest may well depend upon the reasonableness of its actions in relation to the proscription in the consent order and its interactions with the FTC, but the government has not restricted the inquiry into these matters. On the other hand, it is virtually inconceivable that the thought processes of, and internal communications among, certain FTC staff attorneys could lead to the discovery of admissible evidence relevant to the good faith of Reader's Digest.

Finally, it appears that much of the information sought from Mr. Ryder and Mr. Sanger, both of whom are attorneys, was developed in anticipation of litigation. Thus, their opinions and thought processes may not be examined absent a showing of substantial need. Rule 26(b)(3), F.R.Civ.P.; *Hickman* v. *Taylor,* 329 U.S. 495, 512 (1947). As the previous discussion amply demonstrates, defendant has not established a need for the information.

Accordingly, defendant's motion to compel answers has been denied.

FEDERAL TRADE COMMISSION v. GIBSON PRODUCTS OF SAN ANTONIO, INC. et al.*

No. 76-1818. F.T.C. Docket No. 9016.

(United States Court of Appeals, Fifth Circuit, May 22, 1978)

On petition for rehearing, which primarily requested that court delete certain words and phrases from its March 17, 1978 opinion "that might prejudice Gibson," court reiterated that it had expressed no opinion on the merits of the subpoena enforcement action, and stated that comments in its opinion were intended to explain the relevance of subpoenas, rather than disparage respondents. Rehearing was denied, but court's opinion was modified to exclude certain language.

John F. Fischback, Gerald Harwood, Asst. Gen. Counsel, *Mark W. Haase,* Asst. Gen. Counsel, *Robert J. Lewis,* Gen. Counsel, and *Gerald P. Norton,* Deputy Gen. Counsel, FTC, Washington, D.C., for plaintiff-appellee.

Bardwell D. Odum and *Robert E. Rader, Jr.,* Dallas, Tex., for defendants-appellants.

Before BROWN, *Chief Judge,* GODBOLD, *Circuit Judge,* and MEHRTENS,** *District Judge.*

ON PETITION FOR REHEARING

PER CURIUM: The petition for rehearing which does not challenge the Court's holding, primarily requests the Court to delete certain words and phrases that might prejudice Gibson. We reiterate that we express no opinion on the merits of the case. None of the language is to be taken as a prejudgment on the merits of the case whether between Gibson and the FTC or between Gibson and other private parties. The comments are principally made to explain the relevance of the subpoenas.

No disparagement is intended of Gibson for having vigorously asserted its contentions that we have examined and overruled.

We do, however, amend the opinion in the first sentence of the second paragraph of footnote nine by deleting the word "this" and substituting "an analogous." We also delete the last sentence of the opinion which reads: "The five Gibson corporations cannot keep playing hide-and-seek with the FTC." In all other respects, the petition for rehearing is Denied.

*Not reported in Federal Reporter. Reported in Trade Reg. Rep. ¶ 62,068 at 74,638 (1978-1 Trade Cases). For case before the Commission, see *In the Matter of Herbert R. Gibson, Sr., t/a Gibson Products Company, etc., et al.,* 87 F.T.C. 1389.

**Senior District Judge of the Southern District of Florida, sitting by designation.

ASH GROVE CEMENT COMPANY *v.* FEDERAL TRADE COMMISSION*

No. 75—3143. F.T.C. Docket No. 8785.

(United States Court of Appeals, Ninth Circuit, May 23, 1978)

1. F.T.C.'S ECONOMIC REPORT AND SUBSEQUENT ENFORCEMENT POLICY WERE NOT ISSUED AS TRADE REGULATION RULES.

   [1369] Neither the Federal Trade Commission's economic report nor its enforcement policy, which were promulgated subsequent to the FTC's investigation of the cement industry, were issued as trade regulation rules.

2. ONCE TRADE REGULATION RULES ARE FOUND APPLICABLE TO PARTICULAR ADJUDICATIVE ISSUE, THEY BIND INVOLVED PARTIES.

   Trade regulation rules, once found applicable to a particular adjudicative issue, are binding on the parties involved.

3. INVESTIGATIONS THROUGH TRADE REGULATION PROCEEDINGS AND USE OF SUCH DATA IN SUBSEQUENT ADJUDICATIVE ENFORCEMENT PROCEEDINGS, ARE WITHIN F.T.C.'S AUTHORITY.

   Federal Trade Commission has authority to conduct investigations through the medium of a trade regulation rule proceeding and to utilize the expertise and information obtained thereby in subsequent adjudicative enforcement proceedings.

4. AUTHORIZING PROVISION OF THE CLAYTON ACT USES NO LANGUAGE THAT RESTRICTS ELABORATION OF THE STATUTORY STANDARD TO ADJUDICATIONS.

   While the provision of the Clayton Act authorizing the Federal Trade Commission to enforce section 7 of the Act refers only to adjudication as the means of enforcing the Act against specific violators, it does not use any limiting language suggesting that adjudication is the only proper method of elaborating the statutory standard.

5. F.T.C.'S AUTHORITY TO CONDUCT INVESTIGATIONS OF INDIVIDUALS, CORPORATIONS AND INDUSTRIES IS EXPLICIT.

   Federal Trade Commission has explicit authority to conduct investigations of individuals, corporations or industries to assist its enforcement of the acts which it administers.

6. DATA COMPILED THROUGH ITS INVESTIGATIONS MAY ALERT F.T.C. TO SITUATIONS WARRANTING ENFORCEMENT ADJUDICATION, AND ASSIST THE AGENCY IN PERFORMING ITS STATUTORY FUNCTIONS.

   Information gathered by the Federal Trade Commission under its broad investigatory powers can be used for a variety of purposes, including promulgation of new rules, reporting to Congress, disseminating economic knowledge to the public, or to prepare an economic survey or report to enable the FTC to better administer the statutes over which it has jurisdiction; in addition, factual material compiled by the FTC may call its attention to situations which warrant an adjudicative enforcement proceeding.

7. FOLLOWING TRADE REGULATION RULE PROCEEDINGS, F.T.C. CAN PROMULGATE A RULE, ISSUE A POLICY STATEMENT AS AN IN-

*Reported in 577 F.2d 1368 (1978); *Rehearing* and *Rehearing En Banc denied* July 13, 1978; *Cert. denied*, 439 U.S. 982 (1978). For case before the Commission, see 85 F.T.C. 1123.

DUSTRY GUIDE, OR DECIDE THAT NO RULE IS NECESSARY AND TERMINATE ITS EFFORTS.

Once trade regulation rule proceedings are concluded, the Federal Trade Commission can proceed to issue a trade regulation rule, can determine no rule is necessary and culminate its efforts, or can simply issue a policy statement as an industry guide.

8. F.T.C. WAS FULLY AUTHORIZED BY LAW TO CONDUCT CEMENT INDUSTRY INVESTIGATION THROUGH TRADE REGULATION RULE PROCEEDINGS AND SUBSEQUENTLY PROMULGATE A STAFF REPORT AND AN INDUSTRY GUIDE.

Federal Trade Commission's investigation of the cement industry through the medium of a trade regulation rule proceeding and its subsequent promulgation of a staff report and an industry guide were fully authorized by law.

9. ALLEGATIONS OF IMPERMISSIBLE BIAS RESULTING FROM ADMINISTRATIVE AGENCY'S COMBINED INVESTIGATIVE AND ADJUDICATIVE FUNCTIONS MUST OVERCOME PRESUMPTION OF ADJUDICATOR'S HONESTY AND INTEGRITY.

[1370] Claims that an administrative agency is impermissibly biased because of its combination of investigative and adjudicative functions must overcome a presumption of honesty and integrity on the part of the decision maker.

10. PRESUMPTION OF FAIRNESS IN F.T.C.'S ADJUDICATIVE PROCEDURES WAS NOT OVERCOME BY CONTENTION OF ILLEGAL PREJUDGMENT BY AGENCY RESULTING FROM PRIOR EXPOSURE TO ISSUES INVOLVED THROUGH ITS INVESTIGATION.

While cement company, against which an order of divestiture was issued by the Federal Trade Commission, alleged that the FTC's prior exposure to the issues involved in the case through its investigation caused it to unlawfully prejudge the adjudicative proceeding below, the company failed to overcome the presumption of fairness by the FTC in its adjudicative enforcement procedures.

11. APPELLATE REVIEW OF F.T.C.'S FACTUAL FINDINGS IS RESTRICTED TO A DETERMINATION AS TO WHETHER THEY ARE SUPPORTED BY SUBSTANTIAL EVIDENCE.

Scope of the Court of Appeals' review of factual findings made by the Federal Trade Commission is very narrow; the Federal Trade Commission Act mandates that "[t]he findings of the Commission as to the facts, if supported by the evidence, shall be conclusive," and this language has been judicially interpreted to confine the exercise of appellate review of agency fact-findings to a determination of whether they are supported by substantial evidence.

12. WHILE NO PROOF OF ACTUAL ANTICOMPETITIVE EFFECT IS REQUIRED FOR A SECTION 7 VIOLATION OF THE CLAYTON ACT, F.T.C. BEARS BURDEN OF PROVING THERE WAS A REASONABLE PROBABILITY DISPUTED ACQUISITIONS WOULD SUBSTANTIALLY LESSEN COMPETITION IN RELEVANT MARKETS.

Although cement company, against which an order of divestiture was issued by the Federal Trade Commission, was correct in maintaining that the FTC had the burden of proving that there was a reasonable probability that the disputed acquisitions would substantially lessen competition in the relevant product and geographic markets, proof of an actual anticompetitive effect was not an essential ingredient of a violation of section 7 of the Clayton Act.

13. SINCE SUBSTANTIAL EVIDENCE IN THE RECORD SUPPORTED FINDINGS OF PROBABLE AND ACTUAL ANTICOMPETITIVE EFFECTS OF ACQUISITIONS, COURT WOULD HAVE TO SUPPORT F.T.C. EVEN IF IT AGREED THAT COMPANY'S POST ACQUISITION EVIDENCE MADE A STRONG SHOWING THAT NO VIOLATION HAD OCCURRED.

As regards Federal Trade Commission order of divestiture issued against cement company, the company's postacquisition evidence, even if believed, showed nothing more than that a quantum of competition remained in the area cement industry after the acquisitions, but this did not refute the government's extensive counterproof that anticompetitive effects were probable to occur and in fact actually did occur; moreover, even if the court were to accept the company's exhibits as reliable and even if it were to agree that a strong showing of no violation had been made, it nevertheless would have to affirm the FTC as the record contained substantial evidence to support the FTC's findings.

14. WHERE HEIGHTENED PRICE COMPETITION FOLLOWING ACQUISITION APPARENTLY STEMMED FROM DESPERATION EFFORTS BY INDEPENDENTS TO MAINTAIN FOOTHOLD IN INCREASINGLY COMPETITIVE MARKET, F.T.C. DID NOT ERR IN ORDERING MAJOR PRODUCER OF PORTLAND CEMENT TO DIVEST TWO READY-MIX CEMENT COMPANIES.

Federal Trade Commission did not abuse its discretion in ordering cement company, the major manufacturer and supplier of portland cement which is the chief ingredient of ready-mix cement, to divest itself of two ready-mix cement companies, even though, during the two years following the subject acquisitions, price competition appeared to increase as a result of desperation attempts by independents to maintain a foothold in the increasingly concentrated markets.

15. MARKET SOUNDNESS IS NOT INDICATED BY A FLURRY OF PRICE COMPETITION IN A HEAVILY CONCENTRATED MARKET WHICH MAY RESULT IN THE ELIMINATION OF INDEPENDENT COMPETITORS.

Although price competition in an unconcentrated market is a sign of healthy competition, a brief flurry of price competition in a heavily concentrated market which has the effect and possibly the purpose of destroying independent competitors is not a sign of a healthy market.

16. POSTACQUISITION EVIDENCE THAT FAILS TO SHOW COMPETITION AS IT MIGHT HAVE REMAINED WITHOUT ACQUISITION WARRANTS NO DETERMINATIVE WEIGHT, NOR IS AN ACQUISITION IMMUNIZED BY VIGOR REMAINING IN AN INCREASINGLY CONCENTRATED INDUSTRY.

As regards the propriety of an order of divestiture issued by the Federal Trade Commission, postacquisition evidence of continued competition is not entitled to determinative weight because it does not show what kind of competition might have remained had there been no illegal acquisitions; remaining vigor in an industry cannot immunize an acquisition if the trend in that industry is toward ever-increasing con[1371]centration.

17. DIVESTITURE OF ILLEGALLY ACQUIRED STOCK IS NOT BARRED BY PASSAGE OF TIME PER SE.

Passage of time per se is no barrier to divestiture of stock illegally acquired, Clayton Act.

On petition by cement company to review an order of divestiture and a cease and desist order issued by the Federal Trade Commission, the Court of Appeals, James M. Carter, Circuit Judge, held that: (1) the FTC's investigation of the cement industry through the medium of a trade regulation rule proceeding and its subsequent promulgation of a staff report and an industry guide were fully authorized by law, (2) while petitioner company alleged that the FTC's prior exposure to the issues involved in the case through its investigation caused it to unlawfully prejudge the adjudicative proceeding below, the company failed to overcome the presumption of fairness by the FTC in its adjudicative enforcement procedures, (3) the company's postacquisition

evidence, even if believed, showed nothing more than that a quantum of competition remained in the area cement industry after the acquisitions, but this did not refute the government's extensive counterproof that anticompetitive effects were probable to occur and in fact actually did occur, and (4) it was not error for the FTC to order divestiture on the facts of this case.

Order affirmed.

(Syllabus, with substituted captions, taken from 577 F.2d 1368)

David J. McKean (argued), Washington, D.C. for petitioner.
Jerold D. Cummins (argued), Washington, D.C. for respondent.
On Petition to Review an Order of the Federal Trade Commission.

Before CARTER and HUG, *Circuit Judges,* and HAUK,* *District Judge.*
JAMES M. CARTER, *Circuit Judge:*

This is a petition by Ash Grove Cement Company to review an order of divestiture and a cease and desist order issued by the Federal Trade Commission (FTC or Commission). The Commission issued the orders after adjudicating that Ash Grove had violated § 7 of the Clayton Act by its acquisition of two ready-mix concrete companies. Ash Grove raises three contentions: (1) all of the material issues in the adjudicative proceedings were prejudged against Ash Grove in unlawful non-adjudicative agency proceedings; (2) the evidence does not support the Commission's finding that Ash Grove's acquisition caused a lessening of competition; and (3) it was error for the Commission to order divestiture in the facts of this case.

We AFFIRM.

I. FACTS

Ash Grove is a major supplier and manufacturer of portland cement (hereafter "portland") which is the major and most expensive ingredient of ready-mix cement (hereafter "ready-mix"). Between 1961 and 1966 Ash Grove sold an average of about 400,000 barrels of portland annually in the Kansas City Metropolitan Area (KCMA). This amounted to between 13% and 18% of the total annual sales of portland in the KCMA. Most portland was sold to manufacturers of ready-mix.

On June 1, 1964, Ash Grove purchased 50% of the stock of Fordyce Concrete, a ready-mix manufacturer engaged in business in the KCMA since 1961. About two and one-half years later, on November 8, 1966, Ash Grove purchased the outstanding 50% of Fordyce stock,

*Honorable A. Andrew Hauk, United States District Judge, Central District of California, sitting by designation.

thereby obtaining 100% ownership. At that time Fordyce was the third largest ready-mix company in the KCMA, producing 14% of the local output. It was the largest independent ready-mix manufacturer; the two larger firms already had been acquired by other portland manufacturers.

In the early 1960's Ash Grove also acquired one third of the stock of Lee's Summit, another ready-mix manufacturer in the KCMA. On January 6, 1966, Ash Grove purchased the remaining two-thirds of the Lee's Summit stock. At that time Lee's was the seventh largest KCMA ready-mixer, with 4.3% of the total local output. In effect Ash Grove, through these two acquisitions, had acquired customer firms which, combined, represented nearly one-fifth of the KCMA ready-mix industry. The assets of Lee's were subsequently transferred to Fordyce through liquidation and the two companies were operated as one under the name "Fordyce-Summit".

At about the same time that Ash Grove was in the process of acquiring Fordyce and Lee's, the Federal Trade Commission conducted an investigation of the problem of vertical integration in the cement industry. In April, 1964, the FTC announced that due to the "growing importance and urgency" of the industry-wide trend toward integration of the cement industry, it would institute a trade regulation rule proceeding to organize and appraise "the general econom[1372]ic facts involving [the cement] industry and market structure . . ." *Permanente Cement Co.*, 65 F.T.C. 410, 494 (1964). On December 1, 1964, the Commission issued a minute order directing its Bureau of Economics to conduct the inquiry,

> . . . *to obtain information* concerning such matters as the structure of the cement-producing and principal cement-consuming markets, the nature of the relevant product and geographic markets, the causes and business reasons underlying such acquisition and the probable effects of such acquisitions on competitive conditions of the market and industries involved *which may be of assistance to the Commission* in discharging its responsibilities to enforce the laws, in particular Section 7 of the Clayton Act, applicable to such acquisitions. *See FTC Economic Report on Mergers and Vertical Integration in the Cement Industry* at v (1966). (Emphasis added.)

After nearly two years of study the Bureau of Economics on April 4, 1966, transmitted to the Commissioners the staff report entitled *Economic Report on Mergers and Vertical Integration in the Cement Industry* (hereafter "Economic Report"). The Economic Report analyzed twenty-two target metropolitan areas, including the KCMA, to determine the extent and anti-competitive effects of vertical integration in the cement industry. No trade regulation rule was ever issued.

The Economic Report was the subject of public hearings in June 1966. On January 3, 1967, the FTC, based on the report and the public hearings,[1] issued its *Enforcement Policy with Respect to Vertical Mergers in the Cement Industry* (hereafter "Enforcement Policy"). The Enforcement Policy concluded that vertical mergers in the cement industry, particularly those involving ready-mix companies, "can have substantial adverse effects on competition in the particular market areas where they occur." *Id.* at 2. Guidelines were promulgated to indicate which mergers the FTC would be likely to challenge. However, it was expressly stated that any enforcement proceedings would be judged on the basis of the facts presented in the individual adjudicative proceedings instituted.

On July 8, 1969, the FTC issued a complaint charging Ash Grove with violation of § 7 of the Clayton Act, as amended, 15 U.S.C. § 18, by its acquisitions of Fordyce and Lee's Summit.[2] Ash Grove admitted the acquisitions took place, but denied their illegality. Furthermore, Ash Grove claimed that its right to due process of law had been and would be further infringed because the major issues in the complaint allegedly had been prejudged by the FTC. A series of attempts by Ash Grove to have the complaint dismissed and to limit the proceedings were all unsuccessful. After extensive hearings[3] the administrative law judge found in his Initial Decision filed September 23, 1974, that the challenged acquisitions were in violation of § 7 of the Clayton Act.[4] A proposed order requiring divestiture was included with the decision.

[1373] On appeal the Commissioners entertained extensive briefing and oral argument, but ultimately issued an Opinion and Order on July 24, 1975, affirming the Initial Decision of the administrative law judge with modifications.[5]

The Commission's Order decreed that Ash Grove divest itself of all stock, assets and properties acquired as a result of the acquisitions of

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[1] The cement industry was active in response to the opportunity to comment through oral and written statements. Ash Grove itself was among the members of the industry participating.

[2] The complaint also alleged a violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, because of Ash Grove's acquisition of assets from individuals which formerly had been a division of Union Construction Company of Kansas City, Missouri. The administrative law judge found this acquisition of Union's assets to violate Section 5 of the F.T.C. Act, but the Commission reversed his finding on appeal. This ruling by the FTC is not at issue in this appeal.

[3] As is true with many modern antitrust proceedings, the record in this case was voluminous. It consisted of 3546 pages of transcript, the testimony of 23 witnesses, 98 Commission exhibits and 107 exhibits by Ash Grove, excluding exhibits which were either rejected or withdrawn.

[4] The administrative law judge made 117 separate findings of fact. Generally, he found that portland cement and ready-mix concrete were proper lines of commerce within § 7 of the Clayton Act; that the KCMA was the proper section of the country within which to evaluate the effects of the acquisitions; that the effects of the acquisitions are or may be: (1) foreclosure of competitors from a segment of the market otherwise open to them, (2) to increase concentration in an already heavily concentrated market, (3) to increase barriers to entry into the KCMA cement industry, and (4) to force existing competitors out of business. Ultimately, therefore, the administrative law judge found the effects of the acquisitions may be substantially to lessen competition in the manufacture and sale of portland and ready-mix in the KCMA, constituting a violation of § 7 of the Clayton Act.

[5] One of the five Commissioners dissented in part from the decision and order of the Commission.

the stock of Fordyce and Lee's. Ash Grove filed a petition for reconsideration requesting that the remedy of divestiture be withdrawn. The petition was summarily denied and this petition for review followed.

II. Due Process of Law.

Ash Grove contends its constitutional right to due process of law was violated because the FTC's investigation of the cement industry and subsequent promulgation of the Economic Report and the Enforcement Policy (1) were without statutory authority, and (2) caused the Commission to prejudge all the material issues involved in the adjudicative proceeding instituted against Ash Grove.

The heart of Ash Grove's contention that the FTC acted without statutory authority is that the Commission was engaged in rulemaking when it investigated the cement industry and promulgated the Enforcement Policy. Allegedly the Enforcement Policy is a "per se rule of illegality". According to the argument, § 11(b) of the Clayton Act, which contains the statutory authority for the FTC to enforce § 7 of the Clayton Act, restricts the agency to enforcement solely by adjudicative procedures. Thus, Ash Grove maintains, the FTC was not statutorily authorized either to investigate the cement industry through a trade regulation rule proceeding or to issue a rule based thereon.

[1, 2] Ash Grove is mistaken both as to its allegation that the Enforcement Policy constitutes a "rule" and as to its contention that the FTC cannot conduct investigations in the form of trade regulation rule proceedings. First, neither the Economic Report nor the Enforcement Policy were issued as trade regulation rules. Trade regulation rules, once found applicable to a particular adjudicative issue, are binding on the parties involved. *See* 16 C.F.R. § 1.12(c). *See also Gifford-Hill & Company, Inc.* v. *F.T.C.*, 389 F.Supp. 167, 175 (D.D.C. 1974), *aff'd* 173 U.S.App.D.C. 135, 523 F.2d 730 (1975). Here the investigation was conducted in the form of a trade regulation rule proceeding, ostensibly with the intention of establishing a rule if feasible.[6] However, no rule was promulgated. The FTC Division of Industry Analysis of the Bureau of Economics conducted the investigation and issued a staff report to the Commission. The Commission then held public hearings on the Economic Report to afford the public an opportunity to comment. Referring specifically to the Economic Report the Commission assured that it constituted

[6] The Chairman of the FTC informed Congress in February, 1966:

> The program for fiscal 1967 contemplates the promulgation of a trade regulation rule on some aspect of the merger problem in the cement industry. The target date for the promulgation of the rule is June, 1967. *Hearing Before the Subcommittee on Independent Offices of the Committee on Appropriations*, U.S. House of Representatives, 89 Cong.2d Sess. at 383, 443 (Feb. 10, 1966). *See also Statement of FTC Chairman, Hearings on Independent Office Appropriations Before the Committee on Appropriations*, U.S. Senate, 89 Cong.2d Sess., pt. 1 at 461-462 HR. 14921 (May 12, 1966).

nothing more than a staff document which the Commission "has not approved, disapproved, or passed upon".[7]
[1374] 31 Fed.Reg. 6285 (1966).

After the hearing on the Economic Report was held, at which Ash Grove submitted comment, the Commission issued its Enforcement Policy. This document also was not issued as a rule, but as an industry guide. Although the Commission specified in the Enforcement Policy generally which mergers and acquisitions it intends to challenge, specific care was taken to explain that the document was not binding on any party:

> In view of its extensive activity in the application of Section 7 to forestall anti-competitive mergers, together with its understanding of prospective developments in cement manufacture and distribution, this Commission wishes to make abundantly clear insofar as possible, its future enforcement policy with regard to vertical mergers in the cement and ready-mixed concrete industries. In doing so it is expected that needless litigation may be forestalled. At the same time however it should be noted that *the issues in any proceeding instituted by the Commission will be decided on the merits of that case.*" Enforcement Policy at 8-9. (Emphasis added.)

In subsequent proceedings against various cement producers (including Ash Grove) the Commission has repeatedly reiterated that its hearing examiners as well as the Commission itself are not bound by any of the conclusions in the Enforcement Policy and must base their decisions on the record of the individual enforcement proceedings at issue.[8]

The Enforcement Policy was created and published to increase the expertise of the Commission and to provide guidance for agency staff and industry members plus their counsel regarding the enforcement intention of the FTC with respect to the cement industry. As such it is not a trade regulation rule.

[3, 4] Second, Ash Grove is incorrect that the Commission was without authority to conduct investigations through the medium of a trade regulation rule proceeding and utilize the expertise and information obtained thereby in subsequent adjudicative enforcement

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[7] The Economic Report itself states at page vii that it is only a staff report which the Commission has not approved or disapproved. The Commission further emphasized this fact in its subsequent Notice in the Federal Register, 31 Fed.Reg. 7772 (June 1, 1966).

[8] In its Order and Opinion Denying Motion to Dismiss the Complaint in this case, the FTC cited extensively from its earlier interlocutory opinion and order, issued February 6, 1967 in *Lehigh Portland Cement Company*, Docket No. 8680, *Marquette Cement Manufacturing Company*, Docket No. 8685, and *Mississippi River Fuel Corporation*, Docket No. 8657, 71 F.T.C. 1618, where after again explaining the nature of the Enforcement Policy as an industry guide, the Commision held:

> In each case the burden of proving the allegations of the complaint remains with complaint counsel, and has in no degree been shifted to the respondents. In each case, adjudication by the hearing examiner and the Commission will be made on the record, in accordance with the Administrative Procedure Act. In each case, the hearing afforded the respondents will be full and fair, in the same measure as if no Enforcement Policy had been issued. If the Commission's expertise has been enlarged as a result of the general inquiry conducted by it in connection with formulating the Statement of Enforcement Policy, that fact neither prejudices the respondents' rights nor constitutes any reason for dismissing these proceedings. Respondents are entitled to have their cases adjudicated by Commissioners with open minds, not empty ones. . . . (71 F.T.C. 1619, 1621-22.) *See* Record, Volume III at 1366-67.

proceedings.[9] The FTC is au[1375]thorized to enforce § 7 of the Clayton Act by § 11(b) of the same act which provides in relevant part:

> Whenever the Commission * * * shall have reason to believe that any person is violating or has violated any of the provisions of sections 2, 3, 7 and 8 of this Act, it shall issue and serve upon such person and the Attorney General a complaint stating its charges in that respect, and containing a notice of a hearing * *
>
> * * * * * * *
>
> If upon such hearing the Commission * * * shall be of the opinion that any of the provisions of said sections have been or are being violated, it shall . . state its findings as to the facts, and shall issue and cause to be served on such person an order requiring such person to cease and desist from such violations * * *.

Because this provision mentions only adjudication Ash Grove contends the FTC is prohibited from utilizing any supplemental procedures to facilitate its enforcement of the specified provisions of the Clayton Act. But while § 11(b) refers only to adjudication as the means of enforcing the statute against specific violators, it does not use any limiting language suggesting that adjudication is the only proper method of elaborating the statutory standard. Nor does it in any way suggest that evidence or argument produced as a result of non-adjudicative procedures is inadmissible in adjudicative hearings. It merely provides that once a specific offender has been identified and the decision has been made to proceed against the offender, the proper procedure is adjudication, i.e., complaint, hearing, and a cease and desist order if justified.

[5] Moreover, the Commission has explicit statutory authority to conduct investigations of individuals, corporations or industries to assist its enforcement of the acts which it administers. Section 6(a) of the F.T.C. Act, 15 U.S.C. § 46(a), provides:

> The Commission shall also have power—
>
> (a) To gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices, and management of any . . . corporation engaged in or whose business affects commerce * * and its relation to other persons, partnerships, and corporations.

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[9] In *National Petroleum Refiners Assoc.* v. *F.T.C.*, 157 U.S.App.D.C. 83, 482 F.2d 672 (1973), *cert. denied*, 415 U.S. 951, 94 S.Ct. 1475, 39 L.Ed.2d 567 (1974), this same argument was made with respect to essentially identical language found in § 5(b) of the Federal Trade Commission Act, 15 U.S.C. § 45(b). There Judge Skelly Wright ruled for the District of Columbia Circuit that the Commission's broad rulemaking power does not stand isolated from the Commission's enforcement and law-applying role. He stated:

> . . . Section 5(b) does not use limiting language suggesting that adjudication alone is the only proper means of elaborating the statutory standard. It merely makes clear that a Commission decision, after complaint and hearing, followed by a cease and desist order, is the way to force an offender to halt his illegal activities. *Id.* 157 U.S.App.D.C. at 86, 482 F.2d. at 675.

Section 11(b) of the Clayton Act, relied upon by Ash Grove here invokes the FTC's enforcement authority in virtually the same manner for the Clayton Act as Section 5(b) does for the F.T.C. Act. Except for changes necessary because of the difference between the two acts, the wording in both statutes is identical. Our holding today confirms that § 11(b) of the Clayton Act was not intended to restrict the FTC's non-adjudicative investigative authority.

[6] Information gathered by the Commission under its broad investigatory powers can be used for a variety of purposes, including promulgation of new rules, reporting to Congress, disseminating economic knowledge to the public, or, as here, to prepare an economic survey or report to enable the Commission to better administer the statutes over which it has jurisdiction. In addition, factual material compiled by the agency may call its attention to situations which warrant an adjudicative enforcement proceeding. "In such a case, all information gathered through the many fact-finding activities of the agency may be used as evidence, even if it was originally obtained for the purpose of making an economic or statistical study." Von Kalinowski, *Antitrust Laws and Trade Regulation* § 86.01.

[7, 8] In reply Ash Grove appears to concede the authority of the FTC to investigate, but contends that investigations conducted through trade regulation rule proceedings are *ultra vires.*[10] We have found no authority for this novel proposition. Nothing in either the statute or the regulations prohibits the FTC from conducting investigations through authorized trade regulation rule proceedings. *See* 15 U.S.C. § 46(a); 16 C.F.R. §§ 1.5, 1.6, 2.8. Once such proceedings are concluded the Commission can proceed to issue a trade regulation rule, can determine no rule is necessary [1376] and culminate its efforts, or, can simply issue a policy statement as an industry guide. *See generally* Von Kalinowski, *Antitrust Laws and Trade Regulation* § 83.03[2][d]. We hold that the FTC's investigation of the cement industry through the medium of a trade regulation rule proceeding and its subsequent promulgation of a staff report and an industry guide were fully authorized by law.

[9] Ash's final due process argument is that even if legally permissible, the FTC's prior exposure to the issues involved in this case through its investigation caused it to unlawfully prejudge the adjudicative proceeding below. Claims that an administrative agency is impermissibly biased because of its combination of investigative and adjudicative functions must overcome a presumption of honesty and integrity on the part of the decisionmaker. In the recent case of *Withrow* v. *Larkin*, 421 U.S. 35, 47, 95 S.Ct. 1456, 1464, 45 L.Ed.2d 712 (1975), the Supreme Court ruled:

> The contention that the combination of investigative and adjudicative functions necessarily creates an unconstitutional risk of bias in administrative adjudication has a much more difficult burden of persuasion to carry. It must overcome a presumption of honesty and integrity in those serving as adjudicatory; and it must convince that, under a realistic appraisal of psychological tendencies and human weakness, conferring investigative and adjudicative powers on the same individuals poses such a risk of

[10] In its reply brief Ash Grove goes to great length to distinguish between a "trade regulation rule proceeding" and a "pre-adjudicative complaint investigation", contending the former are *ultra vires* whereas the latter are permissible modes of enforcing the Clayton Act.

actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.

Ash Grove attempts to rebut this presumption by making a comparison between the complaint issued against it in 1969 and selected excerpts from the Report and the Enforcement Policy. The comparison shows that many of the facts reported by the staff in its Economic Report and some of the Commissioners' tentative conclusions reached in the Enforcement Policy were mirrored in the FTC complaint against Ash Grove. However, this does not show impermissible prejudgment. That facts revealed by the staff investigation subsequently formed a part of the foundation for an enforcement proceeding is to be expected. Indeed, one of the purposes of industry investigations is to provide the agency with increased expertise in administering the law by exposing it to the factual background of relevant industries against which to judge individual mergers and acquisitions.

Likewise, the fact that some of the Commissioners' conclusions expressed in the Enforcement Policy were mirrored in the complaint does not prove prejudgment.[11] The Enforcement Policy was openly cautious to phrase its conclusions tentatively. Even the portions used by Ash Grove in its point-by-point comparison show that the Commissioner's expressly conceded the possibility that individual acquisitions or mergers might not violate the statutory standard. For example, the Enforcement Policy concludes: "The Federal Trade Commision has concluded that vertical mergers and acquisitions involving cement manufacturers and consumers of cement, particularly ready-mixed concrete companies, *can* have substantial adverse effects on competition in the particular market areas where they occur." *Enforcement Policy* at 2. (Emphasis supplied.)

Ash Grove maintains that the Commission cannot avoid the implication that it has unfairly prejudged all the material issues by self-serving statements that it will judge each case on its individual merits. However, we reiterate that the presumption favors the Commission and it is incumbent on Ash Grove to make a showing that undue prejudice did occur. The facts suggest otherwise. In its proceeding against Ash Grove the FTC did not rely solely or even primarily on the Economic Report or the [1377] Enforcement Policy to prove its case. Extensive independent evidence was introduced before the administrative law judge and was available upon review by the Commission.[12] In fact, reliance on the information and tentative conclusions reached in the Economic Report and Enforcement Policy alone could not support a finding of violation against Ash

[11] Note that four of the five members of the Commission who decided the Ash Grove case (including three of the four member majority) were not members of the Commission when the Enforcement Policy was developed.

[12] *See* n. 3 *supra.*

Grove. It was the burden of the FTC to make a specific showing with respect to the particular acquisitions subject to the complaint that they were likely to cause the proscribed effect. This showing was amply made.[13]

The issue here is not dissimilar to that in *F.T.C.* v. *Cement Institute et al.*, 333 U.S. 683, 68 S.Ct. 793, 92 L.Ed. 1010 (1948). There the Commission charged and after hearing determined that the respondents' use of a multiple basing-point delivered-price system in the cement industry violated Section 5 of the F.T.C. Act and Section 2 of the Clayton Act. On judicial review one of the respondents contended it did not receive a fair hearing before the Commission since the Commission was biased against the portland cement industry generally. Respondent noted that the Commission had, prior to the filing of its complaint, conducted an investigation resulting in the conclusion that "the multiple basing point system as they had studied it was the equivalent of a price fixing restraint of trade in violation of the Sherman Act," and that the Commission had reported this conclusion to Congress and the President. The Supreme Court "decide[d] this contention [of prejudgment] . . . on the assumption that such an opinion [of the illegality of multiple basing-point delivered-price systems] had been formed by the entire membership of the Commission as a result of its prior official investigations." *Id.* 333 U.S. at 700, 68 S.Ct. at 803. The Court concluded, however, that the Commission had not so prejudged the issues as to impermissibly taint their action in the adjudicative proceeding. It was held not to be a denial of due process for the Commission to express an opinion on the legality of a particular trade practice and thereafter pass upon the lawfulness of the practices while sitting as judges during an adjudicatory proceeding:

> . . . [no] decision of this Court would require us to hold that it would be a violation of procedural due process for a judge to sit in a case after he had expressed an opinion as to whether certain types of conduct were prohibited by law. In fact, judges frequently try the same case more than once and decide identical issues each time, although these issues involve questions both of law and fact. Certainly, the Federal Trade Commission cannot possibly be under stronger constitutional compulsions in this respect than a court." *Id.* 333 U.S. at 702-03, 68 S.Ct. at 804.

[10] Ash Grove has not overcome the presumption of fairness by the FTC in its adjudicative enforcement procedures.

III. Sufficiency of the Evidence.

Ash Grove next contends there has been an inadequate showing that its acquisition of Fordyce and Lee's Summit may substantially

[13] *See* Section III, *infra*.

lessen competition in any section of the country. Section 7 of the Clayton Act provides:

> No corporation engaged in commerce shall acquire . . . the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation . . . where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

[11] The scope of our review of factual findings made by the FTC is very narrow. Section 5(c) of the F.T.C. Act, 15 U.S.C. § 45(c), mandates that "[t]he findings of the Commission as to the facts, if supported by [1378] the evidence, shall be conclusive." This statutory language has been judicially interpreted to confine the exercise of appellate review of agency fact-findings to a determination whether they are supported by substantial evidence. "Findings of fact cannot and will not be set aside if the evidence in the record reasonably supports the administrative conclusion, even though suggested alternative conclusions may be equally or even more reasonable and persuasive. The findings must stand unless they were wrong, and they cannot be wrong—that is reversibly wrong—if substantial evidence supports them." *Colonial Stores Inc.* v. *F.T.C.*, 450 F.2d 733, 739-40 (5 Cir. 1971). *See also Carter Products, Inc.* v. *F.T.C.*, 268 F.2d 461, 495 (9 Cir. 1959), *cert. denied*, 361 U.S. 884, 80 S.Ct. 155, 4 L.Ed.2d 120 (1959).

Ash Grove responds with a detailed cite to its own exhibits to show that in 1967-68 (the two years immediately following the acquisition) competition continued to exist in the portland and ready-mix industries in the KCMA notwithstanding its acquisition of Fordyce and Lee's Summit. But this evidence does not refute the Commission's findings for a variety of reasons.

[12] Although Ash Grove is correct in maintaining the Commission has the burden of proving there was a reasonable probability that the disputed acquisition would substantially lessen competition in the relevant product and geographic markets, *U.S.* v. *E.I. duPont de Nemours & Co.*, 353 U.S. 586, 598, 77 S.Ct. 872, 1 L.Ed.2d 1057 (1957), proof of an actual anticompetitive effect is not an essential ingredient of a Clayton Act § 7 violation. Section 7 was adopted to arrest anticompetitive effects of market concentration in their incipiency.[14]

[14] "Incipiency" in this context denotes "not the time the stock was acquired, but any time when the acquisition threatens to ripen into a prohibited effect." *United States* v. *du Pont de Nemours & Co.*, 353 U.S. 586, 597, 77 S.Ct. 872, 879, 1 L.Ed.2d 1057 (1957).

The core question is whether a merger may substantially lessen competition, and necessarily requires a prediction of the merger's impact on competition, present and future. [Citations omitted.] The section can deal only with probabilities, not certainties. [Citations omitted.] And there is certainly no requirement that the anticompetitive power manifest itself in anticompetitive action before Section 7 can be called into play. If the enforcement of Section 7 turned on the existence of actual anticompetitive practices, the congressional policy of thwarting such practices in their incipiency would be frustrated. *F.T.C.* v. *Procter & Gamble Co.*, 386 U.S. 568, 577, 87 S.Ct. 1224, 1229, 18 L.Ed.2d 303 (1967).

It is for this reason that the Supreme Court has held post-acquisition evidence of the type urged on us by Ash Grove to be entitled to only "extremely limited" weight in tending to refute the anticompetitive probabilities of acquisitions challenged under § 7. The Court recently stated:

In *F.T.C.* v. *Consolidated Foods Corp.*, 380 U.S. 592, 598, 85 S.Ct. 1220, 14 L.Ed.2d 95, this Court stated that postacquisition evidence tending to diminish the probability or impact of anticompetitive effects might be considered in a § 7 case. [Citation omitted] But in *Consolidated Foods, supra*, and in *United States* v. *Continental Can Co.*, 378 U.S. [441] at 463, [84 S.Ct. 1738, 12 L.Ed.2d 953], the probative value of such evidence was found to be extremely limited, and judgments against the Government were in each instance reversed in part because 'too much weight' had been given to postacquisition events. The need for such a limitation is obvious. If a demonstration that no anticompetitive effects had occurred at the time of trial or of judgment constituted a permissible defense to a § 7 divestiture suit, violators could stave off such actions merely by refraining from aggressive or anticompetitive behavior when such a suit was threatened or pending.

Furthermore, the fact that no concrete anticompetitive symptoms have occurred does not itself imply that competition has not already been affected, 'for once the [1379] two companies are united no one knows what the fate of the acquired company and its competitors would have been but for the merger.' *F.T.C.* v. *Consolidated Foods, supra* [380 U.S.] at 598, [85 S.Ct. 1220]. And, most significantly, § 7 deals in 'probabilities, not certainties,' *Brown Shoe* v. *United States*, 370 U.S. [294] at 323, [82 S.Ct. 1502, 8 L.Ed.2d 510] and the mere nonoccurrence of a substantial lessening of competition in the interval between acquisition and trial does not mean that no substantial lessening will develop thereafter; the essential question remains whether the probability of such *future* impact exists at the time of trial. *United States* v. *General Dynamics Corp.*, 415 U.S. 486, 504-05, 94 S.Ct. 1186, 1197, 39 L.Ed.2d 530 (1974).

[13] Ash Grove's post-acquisition evidence, even if believed, shows nothing more than that a quantum of competition remained in the KCMA cement industry after the acquisitions. This does not refute the government's extensive counterproof that anticompetitive effects were probable to occur and in fact actually did occur.

Moreover, the reliability of Ash Grove's post-acquisition evidence is questionable. At the hearing the Commission attorney exposed substantial discrepancies in the data on which Ash Grove's exhibits RX 19 and RX 25 were computed. Many of the remaining Ash Grove

exhibits were derived from these two exhibits. The administrative law judge agreed to admit into evidence the two disputed exhibits and their progeny, but noted repeatedly his serious reservations about their probative utility, particularly for the post-acquisition years 1967-68. The highly substantial discrepancies in the reported data underlying these exhibits were never clarified. We will defer to the factfinder the determination of the weight and inference to be accorded such disputed evidence absent clear error.

Finally, perhaps the most compelling reason to reject Ash Grove's contention that the evidence is insufficient to support the Commission's findings is that Ash Grove's argument misconceives the nature of the substantial evidence standard. Even if we accepted Ash Grove's exhibits as reliable and agreed that a strong showing of no violation had been made, we must affirm the Commission if the record contains substantial evidence to support the Commission's findings. Here Ash Grove has made virtually no claim that the evidence presented to support the Commission's findings was insubstantial. Indeed such a contention would be frivolous. The FTC conducted hearings at which voluminous testimonial and documentary evidence was introduced by both sides. Extensive direct and circumstantial evidence in the record supports the conclusion eventually reached by the Commission. For all of the reasons stated above the Commission's findings and order must stand.

IV. DIVESTITURE

[14] Finally, Ash Grove contends it was error for the Commission to order divestiture because price competition appeared to increase with respect to both cement and concrete in 1967-68. Assertedly this proves that partial integration was healthy for the cement and concrete industries. In addition, Ash Grove argues that the remedy of divestiture is the most drastic of all antitrust remedies and should be applied only when warranted by sound factual bases supported by economic theory.

Price competition was prevalent during 1967-68 in the cement and concrete industries in the KCMA, but was shown by the record to be the result of desperation attempts by independents to maintain a foothold in the increasingly concentrated markets. As substantial consumers of portland were bought up by the cement suppliers, the independents began to offer selective, often secret, price cuts to customers simply to avoid permanent withdrawal from the market.

[15] Price competition in an unconcentrated market is indeed a sign of healthy competition. However, a brief flurry of price competition in a heavily concentrated market which has the effect and possibly [1380] the purpose of destroying independent competitors is not a

sign of a healthy market. Once the independents are eliminated there is no guarantee of continued low pricing from the large integrated suppliers who have acquired captive consumers.

[16, 17] Moreover, as already explained, post-acquisition evidence of continued competition is not entitled to determinative weight because it does not show what kind of competition might have remained had there been no illegal acquisitions. Remaining vigor in an industry cannot immunize an acquisition if the trend in that industry is toward ever increasing concentration.[15]

We note in conclusion that there is a sound basis in precedent for the application of the remedy of divestiture. The Supreme Court in *U.S.* v. *duPont de Nemours & Co.*, 366 U.S. 316, 328-31, 81 S.Ct. 1243, 1252, 6 L.Ed.2d 318 (1961) held:

> It cannot be gainsaid that complete divestiture is peculiarly appropriate in cases of stock acquisitions which violate § 7. That statute is specific and "narrowly directly," *Standard Oil Co.* v. *United States*, 337 U.S. 293, 312, [69 S.Ct. 1051, 93 L.Ed. 1371] (1949), and it outlaws a particular form of economic control—stock acquisitions which tend to create a monopoly of any line of commerce. The very words of § 7 suggest that an undoing of the acquisition is a natural remedy. . . . Of the very few litigated § 7 cases which have been reported, most decreed divestiture as a matter of course. Divestiture has been called the most important of antitrust remedies. It is simple, relatively easy to administer, and sure. It should always be in the forefront of a court's mind when a violation of § 7 has been found.

There was no error in the Commission's order of divestiture against Ash Grove.

V. Conclusion

The order of the Federal Trade Commission is affirmed.

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[15] Ash Grove also implies that the fact that over ten years have elapsed since the acquisitions mitigates against the remedy of divestiture. But, "[t]hat is not the law; the passage of time *per se* is no barrier to divestiture of stock illegally acquired. *United States* v. *Du Pont*, 353 U.S. 586, 590, [77 S.Ct. 872, 1 L.Ed.2d 1057]; 366 U.S. 316, [81 S.Ct. 1243, 6 L.Ed.2d 318]." *United States* v. *Greater Buffalo Press*, 402 U.S. 549, 556, 91 S.Ct. 1692, 1697, 29 L.Ed.2d 170 (1971).

FEDERAL TRADE COMMISSION v. HENRY L. ERNSTTHAL and CALIFORNIA DENTAL ASSOCIATION, and KATHIE BOICE and ORANGE COUNTY DENTAL SOCIETY, INC.*

Misc. No. 78-0064. F.T.C. Docket No. 9093.

(United States District Court, District of Columbia, May 30, 1978)

In granting F.T.C.'s petition for an order enforcing its subpoenas issued in connection with pending adjudication against the American Dental Association, court held that respondents' "indefiniteness" challenge had to be viewed skeptically in light of the fact that three other dental societies had complied with identical subpoenas with no apparent difficulty; that sought information was reasonably relevant to the proceeding; and that respondents had not sustained their burden of demonstrating the undue burdensomeness of the subpoenas.

Before RICHEY, *District Judge*.

MEMORANDUM

This case involves a petition by the Federal Trade Commission (FTC) for an order requiring respondents, the California Dental Association (CDA) and the Orange County Dental Society (OCDS), to comply with the subpoenas *duces tecum* issued by the Commission in connection with the pending adjudicative proceeding against the American Dental Association (ADA), et al., Commission Docket No. 9093. On April 12, 1978, the parties, pursuant to the show cause order previously entered in this case, presented arguments to the Court on respondents' challenges to the subpoenas here in issue. At that time, respondents, who are not parties to the FTC's adjudicative proceeding, challenged the subpoenas on the grounds that (1) the Commission had no jurisdiction over the underlying adjudicative proceeding, and (2) the subpoenas failed to comply with the well-established standards of enforceability. By Order of April 19, 1978, this Court rejected respondents' "jurisdictional" challenge. At that time, the Court reserved ruling on respondents' "non-jurisdictional" challenges in order to permit the Administrative Law Judge (ALJ) and the Commission to consider fully the arguments presented by respondents.[1]

* Not reported in Federal Reporter. Reported in Trade Reg. Rep. ¶ 62,182 at 75,288 (1978-2 Trade Cases.) Stay of the order *denied* by the District Court on June 6, 1978, and *denied* by the Court of Appeals on June 9, 1978.

[1] The Court recognizes that such part of its Order that permitted respondents to raise "new" contentions to the ALJ represents a departure from the traditional application of the doctrine of exhaustion of remedies. Nevertheless, because of the state of the record in this case and because so much of the parties' efforts had been directed to the "jurisdictional" challenge, the Court believed that it would be appropriate and in the interests of justice to permit respondents to have all their arguments considered by the ALJ. In so ruling, the Court did *not* intend to endorse any generally applicable departure from the well-established requirement that challenges to administrative subpoenas must be made initially and in a timely fashion to the ALJ.

On April 21, 1978, respondents filed with the Commission a supplemental motion to quash and/or limit the subpoenas *duces tecum*. Thereafter, on April 28, 1978, ALJ Thomas F. Howder issued Prehearing Order No. 23, which rejected respondents' "new" nonjurisdictional challenges and which ordered respondents to produce the subpoenaed materials by May 31, 1978. Respondents then sought, and were granted, certification of the ALJ's order to the Commission for its consideration. See Prehearing Order No. 24. Respondents also sought, and were granted, a protective order. See Protective Order No. 5. The Commission then considered respondents' contentions and concluded "that there is no sufficient showing to warrant reversal of the ALJ's well-considered ruling." Order Denying Motion to Quash And/Or Limit Subpoenas *Duces Tecum*, at 3 (May 8, 1978). After receiving this final adverse ruling from the Commission, respondents filed with the Court their Supplemental Memorandum In Opposition to Petition to Enforce Subpoenas *Duces Tecum* (May 19, 1978). This case is now, therefore, before the Court on the FTC's petition for enforcement of subpoenas *duces tecum* and for this Court's consideration of respondents' nonjurisdictional challenges to these subpoenas.

Respondents' challenge the enforceability of the subpoenas *duces tecum* here in issue on three grounds: (1) indefiniteness; (2) irrelevancy; and (3) burdensomeness. For the reasons briefly set forth below, the Court upon careful consideration of respondents' argument and the entire record herein rejects all of respondents' challenges. Accordingly, the Court will order respondents to comply fully with the subpoenas *duces tecum* issued by the ALJ in connection with Commission Docket No. 9093.

(1) *Definiteness.* Respondents' "indefiniteness" challenge focuses on the Commission's use of certain phrases in Specifications 1 and 4. Specifically, respondents contend that the phrases "professional propriety," "formal or informal interpretation," and "all interpretations thereof," which are contained in the specifications, are too vague and ambiguous to permit reasonable compliance. The Court finds this language, though broad, to be comprehensible and reasonably definite. In this regard, the Court concurs fully in petitioner's argument that respondents' "indefiniteness" challenge must be viewed skeptically in light of the fact that three other dental societies complied with identical subpoenas without apparent difficulty. *Cf. FTC v. Texaco Inc.* 555 F. 2d 862, 882-83 (D.C.Cir.) (*en banc*), *cert. denied*, 431 U.S. 974 (1977); *FTC v. Dresser Industries, Inc.* 1977-1 TRADE CASES ¶ 61,400, at 71,492 (D.D.C. 1977).

(2) *Relevance.* Respondents challenge Specifications 1, 4 and 5 on the ground that they seek evidence pertaining to ethical standards other than the ADA's *Principles of Ethics*. They challenge Specifica-

tion 1 on the ground that it seeks evidence of informal, as well as formal, enforcement actions. They challenge Specifications 4 and 5 on the ground that they seek evidence of ethical materials dealing with matters other than advertising or contract practices. Finally, they challenge Specification 3 on the ground that it seeks information concerning individuals in charge of CDA and OCDS organizational units not involved in the promulgation or enforcement of ethical standards. Respondents contend that the above-described information is not relevant to the adjudicative proceeding against the American Dental Association, et al.

The Court has carefully examined the Commission's complaint in the underlying adjudicative proceeding and concludes that respondents' construction of the scope of that proceeding is unduly constricted. Moreover, the standards of relevancy upon which respondents premise their challenges are far too stringent for the discovery stage of an adjudicative proceeding. The Court emphatically affirms the position of the ALJ Howder on this issue:

> [I]t should be kept in mind that this Commission proceeding is in the discovery phase. What may be valid discovery now may not eventually amount to relevant or material evidence. I believe that complaint counsel are correct in urging that it is not for CDA and OCDS to decide the needs of complaint counsel in building their evidentiary case. The latter are entitled to examine the disputed documents for themselves, rather than having such information withheld on someone else's assumption that it is [insignificant].

Prehearing Order No. 23, at 4.

Applying the aforestated principle to the particular relevancy challenges asserted by respondents, the Court concludes that all the specifications seek information *reasonably* relevant to the underlying adjudicative proceeding. The Court finds the reasoning of both ALJ Needelman and ALJ Howder persuasive with respect to the particular items sought by complaint counsel. See Prehearing Order No. 16, at 2-4; Prehearing Order No. 23, at 3-6.

(3) *Burden of Compliance.* Respondents initially argued herein that the subpoenas *duces tecum* would be unduly burdensome. ALJ Needleman rejected this argument. See Prehearing Order No. 16, at 4-5. In their most recent filing with the Court, respondents have not reasserted this challenge. The Court has nevertheless considered respondents' contentions with respect to burdensomeness.

The controlling principles that guide this Court in its consideration of respondents' burdensomeness challenge are set forth in *FTC v. Texaco, Inc.* 555 F.2d at 882-83. See *FTC v. Cockrell* 431 F.Supp. 561, 564 (D.D.C. 1977). Applying these principles to the instant case, it is clear that respondents have not sustained their burden of demonstrating the unreasonableness of the subpoenas. Respondents

have not asserted that compliance with the subpoenas would seriously hinder their normal operations, nor, it seems, could they in view of the fact that other dental societies have complied with identical subpoenas without apparent difficulty. *Id.* at 883; *FTC v. Dresser Industries, Inc.*, 1977-1 TRADE CASES, at 71,492. In view of the reasonable relevance of the subpoenaed information, it cannot be said that the instant subpoenas *duces tecum* are unduly burdensome.

For the aforestated reasons, the Court rejects respondents' nonjurisdictional challenges to the enforcement of the subpoenas *duces tecum* issued in connection with Commission Docket No. 9093. Accordingly, the Court will order respondents to comply fully with these subpoenas.[2]

An Order in accordance with the foregoing will be issued of even date herewith.

[2] The Court is aware that these subpoenas are presently returnable on May 31, 1978, and that this return date *may* not be reasonable in view of the date of this Memorandum and Order. The Court is confident that if a postponement of the return date is necessary to permit respondents reasonable time for compliance, the parties will be able to reach agreement on an appropriate extension without further intervention by the Court.

FEDERAL TRADE COMMISSION
v.
GENERAL MOTORS CORPORATION, et al.*

Civ. A. No. C77-927. F.T.C. File No. 99-373

(United States District Court, Northern District of Ohio, June 2, 1978)

On June 2, 1978, Court granted protection to documents submitted by General Motors in response to the Commission's subpoena and entered the following Memorandum and Order.

Before WILLIAM K. THOMAS, *District Judge*.

MEMORANDUM AND ORDER

On December 9, 1977, this court entered an interim protective order prohibiting disclosure by the Federal Trade Commission (FTC) of certain documents subpoenaed by the FTC from General Motors Corporation (GM) until the Commission could rule upon GM's December 8, 1977 letter request for confidential treatment of the subpoenaed data. On March 14, 1978, Carol M. Thomas, secretary of the FTC, responded to GM's letter request on behalf of the Commission in a letter which granted GM's request for confidential treatment in part and denied the request in part. General Motors, one of the defendants in this subpoena enforcement action, thereupon filed a motion for a protective order in this court on April 3, 1978; in its motion GM asks this court to continue in permanent form the interim protective order entered on December 9, 1977.

I.

In their December 8, 1977 letter to the FTC, GM's attorneys contended that the Corporation's responses to specifications 4, 8, 9 and 10(a) of the Commission's subpoena were entitled to confidential treatment under the Federal Trade Commission Act, 15 U.S.C. §45, *et seq.*, the Commission's Rules of Practice, and the Freedom of Information Act, 5 U.S.C. § 552. GM's December 8, 1977 letter request also contained a further ground for confidential treatment for all its subpoened documents (not merely those documents supplied pursuant to specifications 4, 8, 9 and 10(a) which GM contended were confidential under specific statutes or FTC regulations); counsel for GM further argued that unless confidential treatment and a non-

*Not otherwise reported.

disclosure commitment was afforded all of its documents "the Commission will be acting as an unauthorized and unsupervised discovery channel for plaintiffs in two hundred odd civil and criminal cases and proceedings pending against General Motors as a result of its activities which are under investigation." As for the documents and data submitted to the Commission which GM did not contend were confidential under specific statutes or regulations, the Corporation's attorneys sought alternative protection by way of the Commission's "customary 10 day advance notification assurance letter."

In the Commission's March 14, 1978 response to GM, ten-day advance notification was granted GM as to data supplied pursuant to specifications 1, 4, 8, 9 and 10(a), but the Commission denied GM's request for total non-disclosure and denied advance notice prior to release of the great bulk of information which GM had not contended was entitled to confidential treatment under federal statutes or regulations.

General Motors characterizes the "main thrust" of its motion for a protective order as being "designed to protect the integrity of the discovery process in the many cases pending against General Motors." GM's fear is that the FTC will become "a well-stocked pond in which actual or putative plaintiffs, and their attorneys, [will] go on fishing expeditions to obtain evidence for use in litigation against it, thus by-passing applicable discovery rules and limitations." GM therefore argues that it is both appropriate and this court's duty to impose upon the FTC, the litigants and judges in the 200-odd engine interchange cases pending against GM, the United States Congress, and the public in general an across-the-board protective order requiring any party seeking disclosure of documents subpoened by the Commission to litigate their rights to such documents before this court. The court concludes that it has no authority to issue such a broad order and therefore denies the request. However, as later specified in the opinion, this court directs the Commission to enter appropriate orders consistent with this opinion on certain matters presented to it by GM's letter motion of December 8, 1977.

The December 9, 1977 interim protective order of this court was entered to preserve the status quo and protect GM until the Commission had brought its expertise to bear upon GM's request for confidential treatment. Now that the Commission has acted, this court cannot consider the question of protective status for the GM documents in question *de novo*, but is instead limited in the scope of its review to the question of "whether the exercise of the discretion by the Commission was within permissible limits, not whether the District Judge's substituted judgment was reasonable." *Federal*

Communications Commission v. Schreiber, 381 U.S. 279, 291 (1965).[1] *See also Federal Trade Commission v. Anderson*, 442 F.Supp. 1118, 1125 (D.D.C. 1977), *appeal pending* ("the question is not whether the court would have imposed limitations in the first instance, but whether the agency's action violates a specific constitutional or statutory limitation or is an abuse of discretion. . . ."); *Federal Trade Commission v. Stanley H. Kaplan Educational Center, Ltd.*, 433 F.Supp. 989, 993-994 (D. Mass. 1977) ("Thus the proper standard of review of agency action is whether the agency exercised its power in a reasonable manner, not whether reasonable minds might differ on the wisdom of the action.").[2]

The cases cited by General Motors on the issue of this court's jurisdiction are inapposite. The protective order in the *Texaco* case was entered solely upon the basis of the specific facts present in that case:

> The court is not herein adopting a rule of general applicability for a 10-day notice provision. It is rather adopting for purposes of this case a proposal for confidentiality advanced by FTC, even though this was put as a basis for settlement and no settlement was reached.

555 F.2d at 884 n. 64. More importantly, the *Texaco* case in no way supports the scope of the protective order sought in this case, since the Court of Appeals in that case merely imposed a ten-day notice requirement prior to disclosure of confidential documents—the identical treatment which the FTC, itself, has agreed to give to all of the allegedly confidential or privileged data supplied to the Commission in this case.

Likewise, in the two other cases cited by GM in which courts imposed protective orders, *Genuine Parts Company v. Federal Trade Commission*, 313 F.Supp. 855 (N.D. Ga. 1970), *aff'd on other grounds*, 445 F. 2d 1382 (5th Cir. 1971)[3] and *Federal Trade Commission v. Continental Can Company*, 276 F.Supp. 713 (S.D.N.Y. 1967), the Commission itself conceded that the data supplied to it was of

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[1] In the past, some courts have conditioned enforcement of an agency subpoena upon a protective order. [Citations omitted.] The *Schreiber* decision makes clear, however, that it is the agencies, not the courts, which should, in the first instance, establish the procedures for safeguarding confidentiality. . . .

Federal Trade Commission v. Texaco, Inc., 555 F.2d 862, 884 n. 62 (D.C. Cir.), *cert. denied* 434 U.S. 883 (1977).

[2] *Cf. Vermont Yankee Nuclear Power Corporation v. Natural Resources Defense Counsel*, 46 U.S.L.W. 4301, 4308 (U.S. April 3, 1978):

> The court should engage in this kind of review and not stray beyond the judicial province to explore the procedural format or to impose upon the agency its own notion of what procedures are "best" or most likely to further some vague, undefined public good.

[3] Although GM contends that the Fifth Circuit Court of Appeals affirmed the District Court's protective order in *Genuine Parts*, the first paragraph of the Court of Appeals' opinion clearly states that the FTC's cross-appeal in that case was limited to the District Court's stay of penalties.

a highly confidential nature. In addition, the district court's protective order in *Genuine Parts* merely required ten-days notice prior to the disclosure.[4]

The limited standard of review, previously defined, therefore precludes this court from entering the broad and permanent protective order which General Motors seeks.

II.

The FTC letter order of March 14, 1978 is, however, reviewable under the standard as stated in *Federal Trade Commission v. Anderson, supra*: this court must determine "whether the agency's action violates a specific constitutional or statutory limitation or is an abuse of discretion...." With this standard of review in mind, the relief granted by the Commission's letter order of March 14, 1978 will first be considered. The March 14 letter provided:

> In addition to the protection afforded by Section 10 of the Federal Trade Commission Act (15 U.S.C. §50) and Rule 4.10(c) of the Commission's Rules of Practice and Procedure, the Commission has determined that, subject to the exceptions set out below, it will not disclose any of the following information to any person outside the employ of the Federal Trade Commission, without first giving GM ten (10) days' notice of its intention to do so.
>
> (1) Actual sales figures of engines provided in response to Specification One.
> (2) Internal corporate decisional documents provided in response to Specifications Four and Nine (a)-(c).
> (3) Consumer research provided in response to Specification Eight.
> (4) Actuarial cost information and cost estimates provided in response to Specification Nine (d)-(e).
> (5) Names of past purchasers provided in response to Specification Ten (a).
>
> The balance of this paragraph provides ten days or less notice for the "Commission's furnishing information in response to an official request from a committee or sub-committee of Congress."

With respect to General Motors' documentary responses to specifications 4, 8, 9 and 10(a) of the subpoena, the corporation contended in its letter of December 8, 1977:

> ...the information contained in such documents are "trade secrets and commercial and financial information obtained from" General Motors "and privileged or confidential" under 5 U.S.C. § 552(b)(4) and 4.10(a)(2) of the Commission's Rules of Practice, that such documentary responses contain "trade secrets and names of customers" which the Commission is not authorized to disclose under 15 U.S.C. § 46(f), 18 U.S.C. § 1905 and 4.10(a)(2) and (8) of the Commission's Rules of Practice.

Specifically as to specification 10(a), General Motors stated:

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[4] The FTC states in its brief in this case that both the *Genuine Parts* and *Continental Can* cases "arose prior to the Commission's present practice concerning such [ten-day prior notice] protection...."

Specification 10(a) requests copies of consumer complaints. Such complaints constitute a partial customer list, expressly exempted from disclosure.

In *In re FTC Corporate Pattern Report Litigation*, 432 F.Supp. 291 (D.D.C. 1977) Judge Flannery, faced with a claim that the Commission's Corporate Patterns Report Program "must be invalidated because it envisions publication of 'trade secrets' in violation of section 6(f) of the FTC Act...." required the Commission to "give ten-days notice to any company of a decision to publish that company's individual data before actually doing so." Judge Flannery added:

In this way, the court does not preclude opportunity for a later judicial inquiry into the trade secrets claim, if necessary, in a setting where the inquiry and dispute would be framed concretely.

432 F.Supp. at 312. The judge noted though that "The court might have hesitated to find the claim premature at this time had the corporate parties presented a compelling showing that the CPR data constitutes trade secrets." 432 F.Supp. at 312, n. 52.

In the present case, it is not premature to consider the contention of General Motors that customer complaints given to the Commission in response to specification 10(a) are barred from disclosure by reason of section 6(f) of the Federal Trade Commission Act 15 U.S.C. § 46(f). The Attorney General of Kentucky has now requested that the Commission:

...share its investigational material with the Commonwealth of Kentucky in the above-noted matter and that the F.T.C. through its attorneys move the U.S. District Court for the Eastern District of Ohio for a modification of their Order so as to allow the F.T.C. to share its information with State Attorneys General.

The Commission on April 13, 1978 notified the Attorney General:

At this time, I have determined to grant your request with respect to a portion of the materials. These documents are not exempt from mandatory disclosure under the Freedom of Information Act. However, these same materials are still subject to the Protective Order entered by the United States District Court for the Northern District of Ohio (Eastern Division) dated December 9, 1977, in the matter of *FTC v. General Motors Corporation, et al.*, No.77-927. Access will be delayed 20 days in order to afford General Motors the required 20 days' notice of this disclosure.

While not identifying the materials to be turned over, there is a strong likelihood that the customer names that comprise General Motors' response to Specification 10(a) will be turned over to the Attorney General. Thus the issue is now ripe for decision.

General Motors, in its letter of December 8, 1977 to the Commission, asserted that consumer complaints sought by specification 10(a) "constitute a partial customer list, expressly exempted from disclosure," and the Commission has itself described GM's response to specification 10(a) as "customer names in complaint letters" in its recent brief in connection with the Kentucky Attorney General's request for documents. Since section 6(f) bars the names of customers from public disclosure, it is concluded that the FTC's planned disclosure of these customer names to the Kentucky Attorney General would violate section 6(f) and constitute an abuse of discretion. Giving a ten-day advance notice prior to such disclosure cannot satisfy section 6(f)'s flat bar against the disclosure of customer names.

The Commission's ten-day advance notice order with reference to the subpoena specifications other than 10(a) (specifications 1, 4, 8 and 9) was within its discretion. Concerning the remaining specifications (2, 3, 5, 6, 7, 9(f)-(g)), summarized in the margin,[5] General Motors requested "confidential treatment and a non-disclosure commitment (as with all specifications)" or, in the alternative, issuance by the Commission of its "customary 10 day advance notice assurance letter." The Commission refused all relief as to these specifications.

General Motors thus justified its request for protection of these documents:

> Otherwise the Commission will be acting as an authorized and unsupervised discovery channel for plaintiffs in the 200-odd civil and criminal cases in proceedings against General Motors as a result of its activities which are under investigation.

Arguing that "neither the identity of the requester, nor the purpose to which documents may be put, are relevant to a determination of a party's rights to receive them under the FOIA," the Commission cites *N.L.R.B. v. Sears, Roebuck and Co.*, 421 U.S. 132, 143, n.10 (1975). Contemporaneous with its FOIA action against the NLRB, Sears was preparing an appeal to the General Counsel in Washington from the refusal by a regional director of the Board to file a complaint sought by Sears. In n.10 of its opinion, the Supreme Court concluded:

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[5] In its brief in regard to the Kentucky Attorney General's request for documents, the Commission thus condenses General Motors' responses to these specifications:

> ...No [5 U.S.C. §552(b)(4)] exemption was found arguably applicable to GM's responses to Specifications: 1 (insofar as it comprised information disclosing which engines were installed in 1977 model cars (but not including sales figures)); 2 (advertisements); 3 (GM's communications with its dealers and the public); 5 (service, owner and price manuals); 6 (information disclosing differences among various GM engines contained in manuals responsive to Specification 5); 9(f)-(g) (information disclosing the number of people who took advantage of GM's spring exchange plan, the number of dealers who declined to participate in the plan, and any dealer correspondence indicating criticism or dissatisfaction with the plan); 10(a) (the substance of consumer complaints); 10(b) (legal complaints and responses thereto); 11 and 12 (information provided by GM to the Environmental Protection Agency which that agency determined is not entitled to confidential treatment once the vehicles in question have been introduced for sale.)

Sears' rights under the Act are neither increased nor decreased by reason of the fact that it claims an interest in the Advice and Appeals Memoranda greater than that shared by the average member of the public. The Act is fundamentally designed to inform the public about agency action and not to benefit private litigants. [Citations omitted.]

Thus while the note makes clear that a litigant is not barred from use of the FOIA to obtain information, the Supreme Court also makes clear that any litigant (or his agent) is not entitled to gain a benefit greater than any other member of the public through use of the FOIA.

Valid reasons for confidential treatment in handling discovery of General Motors' documents or records in a particular case may entitle GM to obtain from the court in that case a protective order concerning the extent and use of General Motors' documents or records. Since this is so, General Motors must be given ten-day's lead time to press those reasons before that court prior to Commission disclosure. Given ten-days notice that a person has requested the Commission to release a particular part of GM's documentary responses to the Commission, GM would then be given an opportunity to try to match the request to a particular plaintiff and a particular case and could then seek an appropriate protective order, if none was already in effect.[6] Without such advance notice prior to disclosure, protective orders in individual cases may provide no protection to GM. In order for the various courts to have any hope of policing particular protective orders, GM must know to whom the Commission is releasing its documents.[7]

Pursuant to section 6(f) of the Federal Trade Commission Act, the Commission is to "make public ... such portions of the information obtained by it [under the Act] ... as it shall deem expedient in the

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[6] GM argues that:

> A requesting party could be a plaintiff's brother-in-law or a secretary in a law firm representing a plaintiff and General Motors could not determine that fact. There is therefore no way by which that request could be opposed in the court in which plaintiff's action was pending and forced into the appropriate discovery channel in that court.

While it may not be possible in every instance for GM to match the Commission request with a particular case, the ten-day advance notice requirement is the most feasible notification procedure available to the Commission consistent with its disclosure obligations imposed under the Freedom of Information Act. To require the requester to signify the purpose for his request is, as the Commission states, probably not "relevant to a determination of a party's right to receive [documents] under the FOIA; *NLRB v. Sears, Roebuck and Co., supra.*" The court will not therefore so limit the rights of requesters under the FOIA by imposing any additional conditions GM seeks.

[7] Although judges in the two hundred-odd lawsuits involving GM have the power of contempt to use as a sanction against violation of discovery protective orders, if GM does not know to whom the Commission is releasing its documents it cannot bring possible instances of contempt to a court's attention. Furthermore, contempt or other discovery sanctions can only operate once the information has been released, and by then any damage may have already been done.

public interest." In this case the "public interest" to be considered by the Commission must include a consideration of the 200-odd cases brought against General Motors which involve the subject matter of the Commission's subpoena. Indeed, in granting the Commission's motion to dismiss General Motors' suit to enjoin the Commission investigation in Case No. C77-706, this court ruled:

> In any event, it cannot be said on this record, either as a matter of law or of fact, that the Commission abused its discretion in determining that the subject matter of the engine interchange program (which has produced more than two hundred cases against GM coast to coast) does not represent a purely private controversy from which the Commission should abstain. The wide-spread nature of these cases—arising in at least 38 states and representing governmental and private litigation in both state and federal courts—instead bespeaks the public nature of subject matter of the Commission's investigation.

General Motors Corporation v. Federal Trade Commission, C77-706 (N.D. Ohio, slip op. of Nov. 4, 1977).

The wide-spread litigation involving GM's engine interchange program which caused this court to find sufficient public interest to justify the Commission's investigation obversely requires the Commission to act in a manner that does not upset or defeat discovery orders of the courts in these various cases.[8] This can only be done through a ten-day advance notice commitment. Such advance notice will in no way prevent the disclosure of information required to be disclosed by the Freedom of Information Act, and anything less than such notice, at least as to certain information supplied the Commission, is now found by this court to constitute an abuse of discretion.

While such documents that are undisputedly in the public domain need not be subjected to a ten-day advance notice requirement, any documentary responses of General Motors to the Commission which are or may be subject to a protective order in a pending civil case against General Motors must be protected by such ten-day notice procedure. In view of the public interest test which the Commission must apply in making public such information and the public interest which this court has found existing by virtue of the two hundred-odd cases arising out of GM's engine interchange program, the Commission was bound also to consider the effect that release of GM documents might have upon the protective orders in those two hundred cases.

The Kentucky Attorney General's request for all "investigational material" presents a case in point. Counsel for the Commission state that "any limitations on [the rights of the parties to each others documents] should be sought from Judge Williams, of the Kentucky

[8] The protective order entered by Judge Frank McGarr in *In re General Motors Corporation Engine Interchange Case*, MDL docket No. 308 (N.D. Ill. Nov. 28, 1977) exemplifies the comprehensive discovery protections which might be impaired by release of information by the Commission without any notice to GM.

court, not from this court." This court agrees; but it is equally true that the Kentucky court and the other courts where the two hundred-odd cases are pending, not the Commission, should determine whether any documentary responses of General Motors are subject to any limitations on disclosure.

It is essential then to determine what documentary responses are undisputedly in the public domain and may be released by the Commission without any notice to GM. The court concludes that GM's responses to the following specifications fit this category: 2 (advertisements); 5 (service, owner and price manuals); and 10(b) (legal complaints and responses thereto). All other documentary responses (with the exception of the consumer lists furnished in response to specification 10(a)) are not found to be in the public domain. Therefore their eligibility for protection under a court's discovery order should be determined by that court itself and the Commission has abused its discretion in failing to grant General Motors' request "that the Commission issue its customary ten-day advance notification assurance letter" for its documentary responses to specifications 1, 3, 6, 7, 11 and 12. The court stresses that this finding of abuse of discretion is limited to the facts of this case and the unique situation in which GM finds itself, facing litigation on its engine interchange program in over two hundred lawsuits from coast to coast.

The matter is therefore remanded to the Commission with instructions to enter an order consistent with this court's opinion. Upon notification to the court that such an order has been entered, the December 9, 1977 interim protective order will be vacated and this lawsuit will be ordered dismissed.[9]

IT IS SO ORDERED.

ORDER

Consistent with this court's June 2, 1978 denial of General Motors' April 3, 1978 motion for a protective order and June 2, 1978 extension of the December 9, 1977 interim protective order, GM's motion for a protective order as to the request of the Kentucky Attorney General's Office is denied. Since General Motors is now on notice as to this request, the Commission may release these documents to the Attorney General thirteen days from the date of this order (ten days plus three days for delivery of this order to General Motors). During this thirteen-day period General Motors may, of course, seek a protective order from Judge Williams of the Circuit Court for Franklin County, Kentucky.

IT IS SO ORDERED.

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[9] Since by agreement between the parties (as embodied in a December 9, 1977 stipulation and order entered in this case) GM has complied with the Commission subpoenas at issue in this lawsuit, the FTC's petition for subpoena enforcement appears moot.

PEPSICO, INC. v. FEDERAL TRADE COMMISSION*

No. 78-4056. F.T.C. Docket No. 8856.

PEPSI-COLA ALBANY BOTTLING CO., INC., et al. v. FEDERAL TRADE COMMISSION*

No. 78-4057 F.T.C. Docket No. 8857.

(United States Court of Appeals, Second Circuit, June 6, 1978)

Court granted FTC motion to transfer the proceeding, which seeks judicial review of final Commission orders, to the District Columbia Circuit where Coca-Cola Co. has instituted similar proceedings. Court's order states that transfer to the D.C. Circuit was "in the interest of justice and sound judicial administration," since "it would be a manifest waste of judicial resources to have two courts of appeals engaged in deciding identical issues on *virtually identical records* with the possibility of conflicting decisions."

Before MANSFIELD, *Circuit Judge* and WERKER, *District Judge*.

It is hereby ordered that the motions made herein by counsel for the respondents by notice of motion dated May 23, 1978, to transfer these proceedings for review of the final orders dated April 7, 1978, to the Court of Appeals for the District of Columbia be and they hereby are granted.

It is further ordered that there is pending before the latter Circuit an earlier-instituted proceeding (Dkt. No. 78-1364) for review of a virtually identical order with respect to identical practices which was issued by respondent against Coca-Cola Co., et al. (FTC Dkt. No. 8855), based on an identical complaint and a trial record that was incorporated into the proceedings which are the subject of petitions for review here. Although there are some factual differences between the proceeding before the District of Columbia Court of Appeals and those here, the issues in both proceedings are identical and respondent adopted by reference most of its Coca-Cola opinion for discussion of the issues in the proceedings here.

It would be a manifest waste of judicial resources to have two courts of appeals engaged in deciding the identical issues *on virtually identical records, with* the possibility of conflicting decisions. Accordingly, the above proceedings are transferred to the Court of Appeals for the District of Columbia in the interest of justice and sound judicial administration.

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* Not otherwise reported. For case before the Commission, see 91 F.T.C. 680 (1978).

SID CASEY et al. v. FEDERAL TRADE COMMISSION FEDERAL TRADE COMMISSION v. SID CASEY et al.

No. 77-2697, 77-3155, F.T.C. File Nos. 99-363, 99-340.

(United States Court of Appeals, Ninth Circuit, June 12, 1978)

1. COMPLIANCE WITH AUTHENTICATION REQUIREMENT OF FTC SUBPOENA MAY BE SOUGHT IN FEDERAL COURT.

   The Federal Trade Commission may seek compliance with authentication requirement of one of its subpoenas by instituting an enforcement proceeding in federal court.

2. SINCE FTC COULD SEEK VERIFICATION FOR SUBMITTED DOCUMENTS, A JUSTICIABLE CONTROVERSY STILL EXISTED IN ACTION TO ENJOIN AGENCY'S INVESTIGATION.

   Even though union had submitted documents in compliance with Federal Trade Commission subpoena, a justiciable controversy still existed in union's suit to enjoin FTC investigation where union failed to verify documents and FTC could possibly seek further disclosure.

3. EXTENT OF INJURY FROM ANTICIPATED AGENCY ACTION, DOUBT ABOUT AGENCY JURISDICTION AND INVOLVEMENT OF AGENCY EXPERTISE IN QUESTION OF JURISDICTION ARE FACTORS THAT MAY OUTWEIGH THE PREFERENCE FOR A PRELIMINARY AGENCY DETERMINATION.

   Although failure to exhaust administrative remedies typically precludes judicial relief, other factors occasionally outweigh the preference for a preliminary agency determination, these factors include the extent of injury from pursuing an administrative remedy, degree of doubt about agency jurisdiction and involvement of agency expertise in question of jurisdiction.

4. INJUNCTIVE RELIEF PRIOR EXHAUSTION OF ADEQUATE LEGAL REMEDIES IS USUALLY DENIED.

   Injunctive relief is usually denied until adequate legal remedies are exhausted.

5. AN ALLEGED JURISDICTIONAL DEFECT MAY BE REMEDIED THROUGH JUDICIAL REVIEW OF AN FTC CEASE AND DESIST ORDER.

   Judicial review of a Federal Trade Commission cease-and-desist order is an adequate remedy through which the target of an FTC investigation may raise an alleged jurisdictional defect.

6. A GOOD FAITH CHALLENGE TO FTC SUBPOENAS BY NON-COMPLIANCE CARRIES NO RISK OF CRIMINAL PROSECUTION.

   There is no risk of criminal prosecution where one in good faith challenges an agency subpoena by noncompliance.

7. UNDER THE SHERMAN AND CLAYTON ACTS, LABOR UNIONS ARE "PERSONS."

   Labor unions are "persons" under the Sherman Act and the Clayton Act.

8. FTC'S INVESTIGATION AND REGULATORY POWERS MAY EXTEND TO LABOR UNIONS AS "PERSONS."

   [794] Labor unions may be "persons" within Federal Trade Commission's investigatory and regulatory powers.

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*Reported in 578 F. 2d 793 (1978); *rehearing denied* July 19, 1978.

9. FTCA'S DEFINITION OF A "CORPORATION" MAY FIT LABOR UNIONS.

Labor unions may fit within Federal Trade Commission Act definition of a "corporation."

10. UNION OFFICIALS, AS WITNESSES, MAY BE SUBJECT TO FTC'S SUBPOENA POWER.

Union officials may be subject to Federal Trade Commission subpoena power as witnesses.

11. WHERE ISSUE MAY BE FIRST CONTESTED THROUGH ESTABLISHED AGENCY PROCEDURE, PRIMARY JURISDICTION DOCTRINE IS PARTICULARLY APPROPRIATE.

Primary jurisdiction doctrine expressing deference to administrative agencies and concern for conserving judicial resources, is particularly appropriate where the contested issue may first be litigated through established agency procedures.

12. RATHER THAN STRIPPING COURTS OF JURISDICTION TO ACT, PRIMARY JURISDICTION DOCTRINE RELATES TO WHICH TRIBUNAL, JUDICIAL OR ADMINISTRATIVE, SHOULD ACT INITIALLY.

"Doctrine of primary jurisdiction" relates to which tribunal, judicial or administrative, should first act; doctrine does not strip courts of jurisdiction to act.

13. DISTRICT COURT PROPERLY REFUSED TO ENJOIN FTC'S INVESTIGATION SINCE AGENCY WAS NOT PLAINLY OPERATING OUTSIDE THE SCOPE OF ITS AUTHORITY IN INVESTIGATING POSSIBLE UNFAIR METHODS OF COMPETITION BY UNION AND EMPLOYER.

Despite union argument that Federal Trade Commission had no jurisdiction to investigate collective bargaining activities of bona fide labor unions, FTC was not plainly operating outside the scope of its authority in investigating possible unfair methods of competition by union and employer; thus, district court properly refused to enjoin FTC investigation.

14. CONTROVERSY WAS NOT RENDERED JUSTICIABLE BY THE MERE POSSIBILITY OF PROSECUTION FOR REFUSAL TO COMPLY WITH FTC SUBPOENAS.

Mere possibility of prosecution for union's and union officials' refusal to comply with Federal Trade Commission subpoena duces tecum did not constitute a case or controversy sufficient to render justiciable the issue of constitutionality of statute providing for penalties to comply with subpoenas.

15. A SUBPOENA ENFORCEMENT ORDER IS FINAL AND APPEALABLE.

An order enforcing a subpoena ad testificandum is final and appealable.

16. IF SOUGHT INFORMATION IS NOT PLAINLY INCOMPETENT OR IRRELEVANT TO AGENCY'S LAWFUL PURPOSE, DISTRICT COURT'S ROLE IN ENFORCEMENT PROCEEDING IS STRICTLY LIMITED TO ENFORCING SUBPOENA ATTACKED FOR LACK OF JURISDICTION.

District court's role in a subpoena enforcement proceeding is strictly limited where the subpoena is attacked for lack of agency jurisdiction; thus, the subpoena must be enforced if the information sought is not plainly incompetent or irrelevant to any lawful purpose of agency.

17. SUBPOENA ENFORCEMENT DOES NOT REQUIRE A CONCLUSIVE SHOWING OF AN AGENCY'S JURISDICTION.

A conclusive showing of an agency's jurisdiction is not necessary to justify enforcing a subpoena.

18. FTC'S SUBPOENAS WERE ENFORCEABLE WHERE AGENCY OFFERED THREE PLAUSIBLE JURISDICTIONAL GROUNDS TO JUSTIFY ITS INVESTIGATION OF UNION.

Where Federal Trade Commission offered three plausible jurisdictional grounds to justify its investigation of union, FTC subpoenas issued pursuant to that investigation were enforceable.

Consolidated appeals were taken from actions of the United States District Court for the Western District of Washington, Donald S. Voorhees, J., in refusing union's request to enjoin a Federal Trade Commission investigation of possible unfair methods of competition by union and employer, and in ordering enforcement of subpoenas issued pursuant to that investigation. Union argued that FTC had no jurisdiction to investigate collective bargaining activities of bona fide labor unions. The Court of Appeals, Eugene A. Wright, Circuit Judge, held that: (1) even though union had submitted documents pursuant to subpoena, a justiciable controversy as to union's suit to enjoin investigation still existed since union failed to verify documents and FTC might seek further disclosure; (2) FTC was not plainly operating outside scope of its authority and district court properly refused to enjoin investigation, and (3) FTC subpoenas were properly enforced.

Affirmed.

(Syllabus, with substituted captions, taken from 578 F. 2d 793)

Hugh Hafer (argued), of *Hafer, Cassidy & Price,* Seattle, Wash., for plaintiffs-appellants.

Mark Haase, FTC, (argued), Washington, D.C., for defendant-appellee.

Before WRIGHT and CHOY, *Circuit Judges,* and WEIGEL, *District Judge.**

EUGENE A. WRIGHT, *Circuit Judge:*

[795] These consolidated cases present the issue whether the federal courts should intervene to prevent the Federal Trade Commission (FTC) from investigating appellants, union locals and their principal officers (Unions), to determine if Safeway Stores and the Unions engaged in unfair methods of competition. The Unions contend that judicial intervention is warranted because the FTC has no jurisdiction to investigate collective bargaining activities of bona fide labor unions.

In No. 77-2697 (*Casey I*), the Unions sought to enjoin the FTC investigation. The district court denied equitable relief. In No. 77-3155 (*Casey II*), the FTC petitioned the district court for enforcement of subpoenas after union officers refused to testify at FTC hearings. The court ordered the subpoenas enforced, but this court stayed enforcement pending appeal. We conclude that judicial intervention would be improper and we vacate the stay order and affirm.

* Of the Northern District of California.

BACKGROUND

The FTC issued a resolution on October 13, 1975, directing the use of compulsory process to investigate whether Safeway Stores and other participants in labor-management negotiations affecting the grocery industry in the Pacific Northwest engaged in unfair methods of competition in violation of § 5 of the Federal Trade Commission Act (Act) [15 U.S.C. §§ 41-58].[1]

In February 1977 the FTC served subpoenas duces tecum on the Unions directing them to produce records at a hearing in Seattle. The Unions submitted the records but did not verify their authenticity as required.

After the FTC denied a motion to quash the subpoenas, the Unions filed their complaint in *Casey I,* seeking to enjoin the investigation on the ground that the FTC has no jurisdiction to investigate bona fide labor unions. The Union also asked the court for a declaratory judgment that § 10 of the Act is unconstitutional. The FTC moved to dismiss and the Unions moved for a preliminary injunction and for summary judgment.

The district court granted the FTC's motion to dismiss. It refused to enjoin the investigation, finding that the Unions had not shown that they would suffer irreparable injury if the subpoenas were not quashed. It also found that the FTC was not plainly operating outside the scope of its jurisdiction.

On May 6, 1977, the FTC served subpoenas ad testificandum on officers of the Unions. The first union officer to appear refused to testify on the ground that the FTC was acting outside its authority. He persisted in his refusal to testify despite the Hearing Examiner's warning that § 10 provides penalties and imprisonment for wrongful refusal to testify in response to a subpoena. The other subpoenaed union officers filed affidavits advising the FTC that they would refuse to testify.

In *Casey II,* the FTC petitioned the district court under § 9 of the Act[2] for an order requiring the union officers to testify. The district court issued an order enforcing the subpoenas, finding that the information sought by the FTC was not plainly incompetent or irrelevant to any lawful purpose of the FTC.[796]

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[1] 15 U.S.C. § 45 (1976). The statute empowers and directs the FTC "to prevent persons, partnerships, or corporations . . . from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce."

[2] Section 9 provides:

"in the case of disobedience to a subpoena the Commission may invoke the aid of any court of the United States in requiring the attendence and testimony of witnesses . . .."

15 U.S.C. § 49 (1976).

CASEY I

The Unions appeal from the district court's refusal to enjoin the FTC from investigating or proceeding against them. Appellate jurisdiction is properly founded on 28 U.S.C. § 1292(a)(1) (1970).

A. *Mootness.*

As a preliminary matter, we must determine whether *Casey I* is moot. The FTC contends that, because the Unions had completed submission of documents when they filed suit, there no longer exists a case or controversy.

[1, 2] The Unions did not, however, submit affidavits verifying the authenticity of the documents, as required by the subpoenas. The FTC has neither waived the verification requirement nor stipulated that the Unions have satisfactorily complied with the subpoenas duces tecum. That the documents were not verified suggest that there still exists a controversy.[3]

Moreover, the Unions did not merely request relief from the subpoenas duces tecum. They asked the court for an order permanently enjoining the FTC from investigating or proceeding against them. The possibility that we may yet afford the Unions relief by preventing further disclosure or by requiring the FTC to return records wrongfully subpoenaed vests the appeal with controversy sufficient to render the case justiciable. *See Atlantic Richfield Co.* v. *FTC,* 546 F. 2d 646, 650 (5th Cir. 1977); *FTC* v. *Browning,* 140 U.S. App. D.C. 292, 293, 435 F. 2d 96, 97 n.1 (1970).

B. *Injunctive Relief*

The Unions seek injunctive relief on the ground that the FTC has no jurisdiction to investigate collective bargaining activities of bona fide unions. The FTC argues that judicial intervention is premature, as the Unions have failed to exhaust administrative remedies.

[3] Although failure to exhaust administrative remedies typically precludes judicial relief, other factors occasionally outweigh the preference for a preliminary agency determination. *California ex rel. Christensen* v. *FTC,* 549 F.2d 1321, 1323 (9th Cir.), *cert. denied,* 434 U.S. 876, 98 S.Ct. 227, 54 L.Ed.2d 156 (1977).

[4, 5] We consider three such factors in determining whether to enjoin anticipated agency action: (1) the extent of injury from pursuing an administrative remedy; (2) the degree of doubt about agency

[3] The FTC may seek compliance with the authentication requirement of the subpoena by instituting an enforcement proceeding in federal court. *See* 15 U.S.C. § 49 (1976); 16 C.F.R. § 2.13 (1977).

jurisdiction; and (3) the involvement of agency expertise in the question of jurisdiction. *Id.* (*citing Lone Star Cement Corp.* v. *FTC,* 339 F.2d 505, 510 (9th Cir. 1974)). Applying the *Lone Star Cement* test convinces us that the district court properly refused to enjoin the FTC investigation.[4]

1. *Extent of Injury.*

"Only a clear showing of irreparable injury from anticipated agency action will excuse the exhaustion of administrative remedies and permit judicial intervention in the agency process." *Christensen,* 549 F.2d at 1323. The Unions argue that the threat of criminal prosecution under section 10 of the Act constitutes irreparable injury.[5] [7][7]

[6] The Unions' argument fails, however, because there is no risk of criminal prosecution where one in good faith challenges an agency subpoena by noncompliance. *Atlantic Richfield Co.* v. *FTC, supra,* 546 F.2d at 648-49; *First National City Bank* v. *FTC,* 538, F.2d 937, 938-39 (2d Cir. 1976); *Anheuser-Busch, Inc.* v. *FTC,* 359 F.2d 487, 490 (8th Cir. 1966); *see Reisman* v. *Caplin,* 375 U.S. 440, 447, 84 S.Ct. 508, 11 L.Ed.2d 459 (1964).

2. *FTC Jurisdiction.*

The FTC offers three jurisdictional grounds: (1) FTC power to regulate persons; (2) its power to regulate corporations; and (3) its power to subpoena witnesses pursuant to its power to investigate corporations.

[7, 8] Sections 5 and 6 of the Act empower the FTC to investigate and regulate any "person, partnership, or corporation." The Act does not define "person."[6] However, in determining the meaning of any Act of Congress, unless the context indicates otherwise, " . . . the words 'person' and 'whoever' include corporations, companies,

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[4] In addition, injunctive relief is usually denied until adequate legal remedies are exhausted. *Reisman* v. *Caplin,* 375 U.S. 440, 443, 84 S.Ct. 508, 11 L.Ed.2d 459 (1964); *Myers* v. *Bethlehem Shipbuilding Corp.,* 303 U.S. 41, 50-51, 58 S.Ct. 459, 82 L.Ed. 638 (1938). Judicial review of an FTC cease-and-desist order is an adequate remedy through which the Unions could have raised the alleged jurisdictional defects. *See Blue Ribbon Quality Meats, Inc.* v. *FTC* 560 F.2d 874, 876 (8th Cir. 1977); *Atlantic Richfield Co.* v. *FTC,* 546 F.2d 646, 648-49 (5th Cir. 1977).

[5] The Unions contend that irreparable injury would result from an adverse administrative finding, which might subject the Unions to a collateral estoppel effect in subsequent private treble damages suits. *See Paramount Transp. Systems* v. *Teamsters Local 150.* 436 F.2d 1064 (9th Cir. 1971). If the FTC lacks jurisdiction, however, no party would be collaterally estopped by an FTC finding. *See id.* at 1066.

Even if the FTC has jurisdiction, there is some question whether the Unions would be collaterally estopped in a private suit. *See North Carolina* v. *Chas. Pfizer & Co.,* 537 F.2d 67, 73-74 (4th Cir.), *cert. denied,* 429 U.S. 870, 97 S.Ct. 183, 50 L.Ed.2d 150 (1976). Any collateral estoppel effect would apply "only to those administrative determinations that have been made in a proceeding fully complying with the standards of procedural and substantive due process that attend a valid judgment by a court." *Paramount Transp. Systems,* 436 F.2d at 1066. An adverse determination made under such circumstances would give the Unions no cause to complain.

[6] Labor unions are "persons," under § 8 of the Sherman Act [15 U.S.C. § 7 (1976)], and § 1 of the Clayton Act [15 U.S.C. § 12 (1976)].

associations, firms, partnerships, societies, and joint stock companies, as well as individuals; . . .." 1 U.S.C. § 1 (1976). This definition is arguably broad enough to include labor unions.

[9] Section 4 of the Act provides: "'Corporation' shall be deemed to include any . . . association, incorporated or unincorporated, which is organized to carry on business for its own profit or that of its members. . . ." 15 U.S.C. § 44. It is also not inconceivable that a labor union would come within the Act's definition of corporation. *Compare FTC* v. *National Commission on Egg Nutrition,* 517 F.2d 485, 487-88 (7th Cir. 1975), *with Community Blood Bank* v. *FTC,* 405, F.2d 1011, 1015-20 (8th Cir. 1969).[7]

[10] Moreover, even if labor unions are exempt from FTC regulatory power, union officials may be subject to FTC subpoena power as witnesses. Section 9 of the Act provides in relevant part:

> the Commission, or its duly authorized agents, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any documentary evidence of any person, partnership, or corporation being investigated or proceeded against; and *the Commission shall have power to require by subpoena the attendance and testimony of witnesses* and the production of all such documentary evidence relating to any matter under investigation. . .

15 U.S.C. § 49 (1976) (emphasis supplied).

The § 9 subpoena power has been held to extend "not only to those who are not tar[798]gets of an investigation, but also those who, because of an exemption . . ., can never be targets." *FTC* v. *Rockefeller,* 441 F.Supp. 234, 240 (S.D.N.Y. 1977). *Accord, FTC* v. *Cockrell,* 431 F.Supp. 561, 563-64 (D.D.C.1977). *See also United States* v. *Marshall Durbin & Co.,* 363 F.2d 1, 5 (5th Cir. 1966); *FTC* v. *Harrell,* 313 F.2d 854, 856 (7th Cir. 1963); *FTC* v. *Tuttle,* 244 F.2d 605, 615 (2d Cir. 1957); *Freeman* v. *Brown Bros. Harriman & Co.,* 250 F.Supp. 32, 34 (S.D.N.Y.), *aff'd,* 357 F.2d Cir. 1966).

3. *Agency Expertise.*

Admittedly, the issue of FTC's authority to investigate labor unions may be framed strictly in legal terms. The exhaustion of

[7] The Unions enjoy no specific statutory right to be exempt from the Act, as do some banks and common carriers. *See* 45 U.S.C. §§ 45(a)(2) & 46(a). Exemptions from the antitrust statutes are rarely implied. *United States* v. *Philadelphia National Bank,* 374 U.S. 321, 348, 83 S.Ct. 1715, 10 L.Ed.2d 915 (1963); *Silver* v. *New York Stock Exchange,* 373 U.S. 341, 357, 83 S.Ct. 1246, 10 L.Ed.2d 389 (1963).

Unions are subject to the Sherman Act, for example, when they conspire to restrain competition. *See Local 189, Amalgamated Meat Cutters* v. *Jewel Tea Co.,* 381 U.S. 676, 85 S.Ct. 1596, 14 L.Ed.2d 640 (1965); *UMW* v. *Pennington,* 381 U.S. 657, 85 S.Ct. 1585, 14 L.Ed.2d 626 (1965); *Allen Bradley Co.* v. *Local 3, IBEW,* 325 U.S. 797, 65 S.Ct. 1533, 89 L.Ed. 1939 (1945); *California Dump Truck Owners Ass'n* v. *Associated General Contractors,* 562 F.2d 607 (9th Cir. 1977). The FTC has broad power to declare unlawful trade practices that conflict with the Sherman Act. *FTC* v. *Brown Shoe Co.,* 384 U.S. 316, 320-21, 86 S.Ct. 1501, 16 L.Ed.2d 587 (1966).

remedies doctrine, however, often applies to questions of law as well as to questions of fact. *Christensen*, 549 F.2d at 1324. We are mindful that "[c]ourts should accord deference to an agency's own construction of its authorizing statute when reviewing final agency action." *Id., citing Udall* v. *Tallman*, 380 U.S. 1, 85 S.Ct. 792, 13 L.Ed.2d 616 (1965). Although not controlling, "administrative interpretations of statutory terms are given important . . . significance." *Batterton* v. *Francis*, 432 U.S. 416, 424, 97 S.Ct. 2399, 2405, 53 L.Ed.2d 448 (1977).

[11, 12] We conclude that the Unions' jurisdictional attack is insubstantial. The FTC should have primary jurisdiction to consider the scope of its investigative authority. The primary jurisdiction doctrine,[8] expressing deference to administrative agencies and concern for conserving judicial resources, is particularly appropriate where, as here, the contested issue may first be litigated through established agency procedures. *Christensen*, 549 F.2d at 1324. *See Federal Power Commission* v. *Louisiana Power & Light Co.*, 406 U.S. 621, 647, 92 S.Ct. 1827, 32 L.Ed.2d 369 (1972); *Marine Engineers Beneficial Ass'n* v. *Interlake Steamship Co.*, 370 U.S. 173, 185, 82 S.Ct. 1237, 8 L.Ed.2d 418 (1962); *Klicker* v. *Northwest Airlines, Inc.*, 563 F.2d 1310, 1313 (9th Cir. 1977).

[13] We affirm the district court's finding that the FTC is not plainly operating outside the scope of its authority.

C. *Unconstitutionality of Section 10.*

The Union alleged that they complied with the subpoenas duces tecum because they were threatened with criminal prosecution under § 10 of the Act.[9] They seek a declaratory order that the section violates the separation-of-powers doctrine, denies due process, and denies the right to trial by jury.

[14] We do not reach the issue, however, because the mere possibility of prosecution here does not constitute a case or controversy sufficient to render the issue justiciable. *O'Shea* v. *Littleton*, 414 U.S. 488, 493-99, 94 S.Ct. 669, 38 L.Ed.2d 674 (1974); *Jensen* v. *National Marine Fisheries Service*, 512 F.2d 1189, 1191 (9th Cir. 1975)(*citing United Public Workers* v. *Mitchell*, 330 U.S. 75, 89-90, 67 S.Ct. 556, 91 L.Ed. 754 (1947)).

[8] The doctrine of primary jurisdiction, closely akin to the exhaustion principle, relates to which tribunal, judicial or administrative, should first act. The doctrine does not strip the courts of jurisdiction to act. *FMC* v. *Port of Seattle*, 521a F.2d at 436 n.4. *See McKart* v. *United States*, 395 U.S. 185, 193-94, 89 S.Ct. 1657, 23 L.ED.2d 250 at 251-255 (9th Cir. 1978). *See generally* 3 K. Davis, *Administrative Law Treatise* §§ 19.09, 20.03 (1958).

[9] "Any person who shall neglect or refuse to attend and testify, or to answer any lawful inquiry or to produce documentary evidence, if in his power to do so, in obedience to the subpoena or lawful requirement of the Commission, shall be guilty of an offense and upon conviction thereof by a court of competent jurisdiction shall be punished by a fine of not less than $1,000 nor more than $5,000 or by imprisonment for not more than one year, or by both such fine and imprisonment."

15 U.S.C. § 50 (1956).

CASEY II

[15] The Unions appeal from the district court order enforcing the subpoenas ad testificandum. Such an order is final and [799] appealable for purposes of 28 U.S.C. § 1291 (1970). *E.g., FTC* v. *Texaco, Inc.*, 180 U.S.App.D.C. 390, 555 F.2d 862, 873 n.21, *cert. denied*, 431 U.S. 974, 97 S.Ct. 2940, 53 L.Ed.2d 1072 (1977).

[16] The district court's role in a subpoena enforcement proceeding is strictly limited where the subpoena is attacked for lack of agency jurisdiction. The subpoena must be enforced if the information sought is "not plainly incompetent or irrelevant to any lawful purpose" of the FTC. *Federal Maritime Commission* v. *Port of Seattle*, 521 F.2d 431 (9th Cir. 1975)(*quoting Endicott Johnson Corp.* v. *Perkins*, 317 U.S. 501, 509, 63 S.Ct. 339, 87 L.Ed. 424 (1934)). *Accord, FTC* v. *Swanson*, 560 F.2d 1, 2 (1st Cir. 1977); *FTC* v. *Feldman*, 532 F.2d 1092, 1098 (7th Cir. 1976). *See United States* v. *Morton Salt Co.*, 338 U.S. 632, 652, 70 S.Ct. 357, 94 L.Ed. 401 (1950); *FTC* v. *Texaco, Inc., supra*, 555 F.2d at 872-73 & n.23.

[17] The FTC offered three plausible jurisdictional grounds to justify its investigation; a conclusive showing is not necessary to justify enforcing subpoena. *Marshall* v. *Contractors, Inc.*, 573 F.2d 1055 at 1056 (9th Cir. 1978); *FMC* v. *Port of Seattle, supra*, 521 F.2d at 436.

[18] In *United States* v. *Morton Salt Co.*, 338 U.S. at 642-43, 70 S.Ct. at 364, the Court explained the proper role of administrative investigation:

> The only power that is involved here is the power to get information from those who best can give it and who are most interested in not doing so. Because judicial power is reluctant if not unable to summon evidence until it is shown to be relevant to issues in litigation, it does not follow that an administrative agency charged with seeing that the laws are enforced may not have and exercise powers of original inquiry. It has a power of inquisition, if one chooses to call it that, which is not derived from the judicial function. It is more analogous to the Grand Jury, which does not depend on a case or controversy for power to get evidence but can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not. When investigative and accusatory duties are delegated by statute to an administrative body, it, too, may take steps to inform itself as to whether there is probable violation of the law.

We think the same principles govern here and require that the FTC subpoenas be enforced.

The stay order issued by this court on October 21, 1977 is vacated.

AFFIRMED.

FEDERAL TRADE COMMISSION *v.* LUKENS STEEL COMPANY and UNITED STATES STEEL CORPORATION*

Civ. A. No. 74-926. F.T.C. Docket No. 5508.

(United States District Court, District of Columbia, June 23, 1978)

1. FTC'S RECOVERY UNDER THE APPLICABLE FIVE-YEAR STATUTE OF LIMITATIONS FOR CIVIL PENALTIES WAS RESTRICTED TO THOSE VIOLATIONS OF ITS ORDER WHICH OCCURRED DURING THE FIVE YEARS PRECEDING ITS COMPLAINT.

   The five-year statute of limitations for civil penalty actions was applicable to suit wherein the Federal Trade Commission sought equitable relief and civil penalties for violations of a cease and desist order it had issued; therefore, the FTC's recovery was limited to violations occurring within five years prior to the date of the complaint.

2. FTC MUST PRESENT PROOF OF CONCERTED ACTION TO ESTABLISH THAT DEFENDANTS HAD VIOLATED ITS ORDER PROHIBITING A "PLANNED COMMON COURSE OF ACTION" TO FIX PRICES.

   In order to establish that steel companies violated cease and desist order of Federal Trade Commission which prohibited participation in a "planned common course of action" or knowing contribution to a "planned common course of action" establishing or fixing prices, Commission was required to present proof of concerted action.

3. PROOF OF CONCERTED ACTION IN RESTRAINT OF TRADE IS ALSO REQUIRED TO ESTABLISH A VIOLATION OF SECTION ONE OF THE SHERMAN ACT.

   There must be proof of concerted action in order to establish a violation of the [1183] Sherman Act section which prohibits contracts, combinations and conspiracies in restraint of trade.

4. ROUGHLY TRANSLATED AS "CONCERTED ACTION," SHERMAN ACT'S PROHIBITION OF "CONTRACT, COMBINATION OR CONSPIRACY" IN RESTRAINT OF TRADE PRESENTS A SINGLE CONCEPT ABOUT COMMON ACTION.

   The Sherman Act section which prohibits contracts, combinations and conspiracies in restraint of trade presents a single concept about common action, not three separate ones; "contract, combination or conspiracy" is roughly translated as "concerted action."

5. COURT WAS PROPERLY GUIDED BY CASES ARISING UNDER SECTION ONE OF THE SHERMAN ACT IN DETERMINING WHETHER FTC HAD PROVED DEFENDANTS HAD ENGAGED IN CONCERTED ACTION TO ESTABLISH STEEL PRICES.

   In determining whether Federal Trade Commission proved that steel companies had violated cease and desist order by engaging in concerted action fixing or establishing prices for steel, it was appropriate for federal district court to make reference to interpretations of "concerted action" in cases arising

*Reported in 454 F.Supp. 1182 (1978). For case before the Commission, see, *In re American Iron & Steel Institute et al.*, 48 F.T.C. 123.

under the Sherman Act provision which prohibits contracts, combinations and conspiracies in restraint of trade.

6. EVIDENCE ESTABLISHING "CONCERTED ACTION" IN VIOLATION OF FTC'S ORDER MAY BE CIRCUMSTANTIAL.

"Concerted action" in violation of consent order prohibiting participation in a planned common course of action or knowing contribution to a planned common course of action fixing or establishing prices may be established by circumstantial evidence; neither direct evidence nor evidence of an express agreement is necessary.

7. IF COMBINED CIRCUMSTANCES REVEAL A "UNITY OF PURPOSE, OR A COMMON DESIGN AND UNDERSTANDING, OR A MEETING OF THE MINDS IN AN UNLAWFUL ARRANGEMENT," AN INFERENCE OF "CONCERTED ACTION" IS WARRANTED.

An inference of "concerted action" to fix prices is warranted where the totality of circumstances reveals a unity of purpose or a common design and understanding or a meeting of the minds in an unlawful arrangement.

8. TO DETERMINE WHETHER FTC HAD SUFFICIENTLY PROVED "CONCERTED ACTION," COURT MUST CONSIDER THE EVIDENCE AS A WHOLE.

In determining whether Federal Trade Commission sufficiently proved that steel companies had engaged in "concerted action" in violation of a cease and desist order issued by the FTC, court should consider the evidence as a whole rather than view papers and exhibits in isolation.

9. ANTITRUST CONSPIRACY IS NOT ESTABLISHED BY CONSCIOUS PARALLELISM ALONE.

Though "concerted action" may be inferred from evidence of parallel business behavior, conscious parallelism alone is not sufficient to establish an antitrust conspiracy.

10. AN ANTITRUST VIOLATION IS NOT ESTABLISHED BY PARALLEL PRICING ALONE.

Parallel pricing alone is insufficient to establish an antitrust violation.

11. AN INFERENCE OF "CONCERTED ACTION" WAS WARRANTED IF EVIDENCE REVEALED CONDUCT THAT COULD NOT BE EXPLAINED BY RATIONAL INDEPENDENT BUSINESS BEHAVIOR, BUT ONLY MADE SENSE IN THE CONTEXT OF THE BEHAVIOR OF COMPETITORS.

In suit wherein the Federal Trade Commission sought equitable relief and civil penalties for alleged violations by steel companies of a cease and desist order issued by the FTC which prohibited participation in a planned common course of action or knowing contribution to a planned common course of fixing prices, ultimate determination for federal district court was whether the evidence revealed conduct that could be explained by rational, independent business behavior or could only make sense in the context of the behavior of others; if the latter was true and the behavior made sense only if each steel company's competitor behaved in a similar fashion, then an inference of "concerted action" was warranted.

12. WHERE DEFENDANTS' ACTIONS APPEARED TO BE BASED ON INDEPENDENT, RATIONAL BUSINESS DECISIONS, EVIDENCE FAILED TO SUPPORT AN INFERENCE OF CONCERTED ACTION TO FIX PRICES.

Evidence in action wherein the Federal Trade Commission sought equitable relief and civil penalties for alleged violations by steel companies of a cease and desist order issued by the FTC was insufficient to warrant an inference of concerted action between the steel companies where the actions of each steel com-

pany appeared to be based on independent judgment and a consideration of its own business interests as [1184] well as an assessment of the competition presented by the other steel company.

13. EVIDENCE OF ACTS IN CONTRADICTION OF EACH PARTY'S ECONOMIC SELF-INTEREST AND MOTIVATION TO ENTER INTO AN AGREEMENT MAY WARRANT AN INFERENCE OF "CONCERTED ACTION" TO FIX PRICES.

An inference of "concerted action" to fix prices may be warranted when there is evidence of motivation to enter into an agreement and of acts in contradiction of each party's economic self-interest.

14. FTC FAILED TO SUPPORT ITS CLAIM OF "CONCERTED ACTION" WHERE EVIDENCE INDICATED THAT COMPANIES HAD ACTED UNILATERALLY TO SERVE THEIR OWN SELF-INTEREST.

Evidence that bid awards and price communications appeared to be in economic self-interest of government contractor and thus a product of unilateral action rather than of concerted action among two steel companies and the contractor and that the actions of the steel companies also appeared to be unilateral was not adequate to support Federal Trade Commission's claim that the contractor had engaged in a concerted action with two steel companies to fix prices in violation of prior FTC cease and desist order.

15. FTC FAILED TO PROVE A PLANNED COMMON COURSE OF ACTION BEWEEN GOVERNMENT CONTRACTOR AND EITHER OF THE DEFENDANTS INDIVIDUALLY WHEN IT FAILED TO ESTABLISH THAT STEEL COMPANIES AND CONTRACTOR HAD ENGAGED IN CONCERTED ACTION TO FIX PRICES.

Where the Federal Trade Commission did not prove that steel companies or steel companies and prime government contractor engaged in concerted action in violation of prior cease and desist order prohibiting the steel companies from participating in a planned common course of action or knowingly contributing to a planned common course of action fixing prices, the Commission also failed to prove a planned common course of action between the prime contractor and either of the steel companies individually.

The Federal Trade Commission brought suit to obtain equitable relief and civil penalties for alleged violations of a prior cease and desist order issued by the FTC. The District Court, Gasch, J., held that: (1) the five-year statute of limitations for civil penalty actions was applicable; (2) the evidence as a whole was insufficient to warrant an inference of concerted action between the defendant steel companies; (3) the Commission failed to establish that the steel companies and a prime government contractor had engaged in a planned common course of action in violation of the order, and (4) the Commission failed to prove a planned common course of action between the government contractor and either of the steel companies individually.

Judgment for defendants.

(Syllabus, with substituted captions, taken from 454 F.Supp. 1182)

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MEMORANDUM

GASCH, *District Judge.*

In this action, the Federal Trade Commission (FTC) claims that Lukens Steel Company (Lukens) and the United States Steel Corporation (U.S. Steel) violated the cease and desist order issued by the FTC in *American Iron & Steel Institute,* 48 FTC 150 (1951). The FTC requests, pursuant to sections 5(*l*), 5(m), and 16(b) of the Federal Trade Commission Act (FTC Act), 15 U.S.C. §§ 45(*l*), 45(m), and 56(b) (1976), equitable relief and civil penalties[1] for violations of the order. This matter having been tried to the Court on October 13-27, 1977, the Court makes the following findings of fact and conclusions of law in accordance with Fed.R.Civ.P. 52(a).

I. BACKGROUND

A. *Order.*

The order in *American Iron & Steel Institute,* 48 FTC 150 (1951), was issued on August 10, 1951 in settlement of a complaint filed by the FTC against over one hundred steel producers, including Lukens and U.S. Steel. The FTC alleged in the complaint that the steel producers fixed prices through, *inter alia,* the collusive use of a basing point pricing system and the American Iron and Steel Institute's compilation of pricing factors. The order, in pertinent part, prohibits the steel companies from:

> entering into any planned common course of action, understanding, or agreement between any two or more of said respondents, or between any one or more of said respondents and others not parties hereto and from cooperating in, carrying out [1185] or continuing any such planned common course of action, understanding or agreement, to do or perform any of the following things:
>
> (1) Adopting, establishing, fixing, or maintaining prices or any element thereof at which steel products shall be quoted or sold, including but not limited to base prices, the extras which shall be added to, or the deductions which shall be made from, any base price for any specified characteristic, or loading charge or delivery charge or terms of discount, credit, or other conditions of sale.
>
> (2) Collecting, compiling, circulating, or exchanging between or among respondents, or any of them, a list or lists of base prices or of prices by any other designation, or extra charges thereto or deductions therefrom for any specified characteristic or quantity of steel products or services connected therewith used or to be used in computing prices or price quotations of steel products; or using, directly or indirectly, as a factor in computing price quotations or in making, quoting, or charging prices any such list or lists so collected, compiled, circulated, or exchanged.
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> * * * * * * *

[1] In the complaint, the FTC requests the imposition of the maximum civil penalty that may be assessed under section 5(*l*) of the FTC Act, 15 U.S.C. § 45(*l*) (1976), $10,000 for each day the order was violated. The FTC seeks such a penalty for 1,298 days for the period from June 18, 1969, to February 8, 1973. If the Court imposed the maximum penalty, each defendant would be subject to a liability of approximately $13 million.

(4) Formulating, devising, adopting, establishing, fixing, or maintaining methods or practices of quoting and selling steel products to railroads or other particular classes of customers.

(5) Quoting or selling steel products at prices calculated or determined pursuant to, or in accordance with, any system or formula which produces identical price quotations or prices or delivered costs, or which establishes a fixed relationship among price quotations or prices or delivered costs, or which prevents purchasers from securing any advantage in price in dealing with one or more of the respondents as against any of the other respondents.

* * * * * * *

II. . . . acting, individually or otherwise, so as knowingly to contribute to the maintenance or operation of any planned common course of action, understanding or agreement between and among any two or more of the respondents or between any one or more of them and others not parties hereto through the commission of any of the acts, practices or things prohibited by subparagraphs (1) through (6) of paragraph I of this order.

48 FTC at 152-54.

However, the order explicitly exempted certain types of conduct from its terms. It specifically provided that "evidence of uniformity of prices or any element thereof of two or more sellers at any destination or destinations alone and without more" would be insufficient to establish a violation of the order. 48 FTC at 154, III(1). The order also stated that the "Federal Trade Commission is not acting to prohibit or interfere with delivered pricing or freight absorption as such when innocently or independently pursued, regularly or otherwise, with the result of promoting competition." 48 FTC at 154, III(3).

B. *Complaint.*

[1] On June 18, 1974, the FTC filed this action against Lukens and U.S. Steel. Plaintiff claims that for at least the five years prior to the date the complaint was filed:[2]

[D]efendants, in connection with the offering for sale, sale and distribution in interstate commerce of HY-80 and HY-100, have been continuously, for each day of the aforementioned period, engaged in a planned common course of action, understanding or agreement with each other, with each other and with Newport, or each with Newport, to establish, fix, or maintain prices, including elements thereof such as delivery charges or other con[1186]ditions of sale. Each defendant has also cooperated in, carried out, and contributed to the maintenance or operation of a planned common course of action, understanding or agreement, with each other, with each other and with Newport, or each with Newport, to establish, fix or maintain prices, delivery charges, or other conditions of sale, in a manner prohibited by the Federal Trade Commission's order in Docket 5508.

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[2] The plaintiff's recovery is limited to violations occurring within the five years prior to the date of the complaint, June 18, 1974, because the five-year statute of limitations for civil penalty actions, 28 U.S.C. § 2462 (1970), is applicable. *See United States* v. *Ancorp National Services, Inc.*, 516 F.2d 198, 200 n.5 (2d Cir. 1975).

Complaint ¶ 9. Plaintiff contends that defendants' behavior in connection with the submission of bids to Newport News Shipbuilding and Dry Dock Company for the sale of HY-80 and HY-100 steel plates specifically violated Paragraphs I(1), (2), (4), (5), and II of the order.

C. *HY-80 and HY-100 Steel Plate Industry.*

The alleged violations of the order arose solely in connection with the submission of bids by Lukens and U.S. Steel for the sale of HY-80 and HY-100 steel plates to Newport News Shipbuilding and Dry Dock Company, a prime contractor of the Government. HY-80 and HY-100 steel plates (HY-steel plates) are highly specialized special treatment premium quality alloy steel plates used primarily in the construction of combat vessels for the United States Navy. [3] HY-steel plates are produced according to specifications established by the Navy, and only steel producers certified by the Navy are permitted to produce HY-steel plates for use in Navy vessels. U.S. Steel, Lukens, Armco Steel Corporation (Armco), and Bethlehem Steel Corporation (Bethlehem) were qualified producers during the period of the alleged violations.[4]

Newport News Shipbuilding and Dry Dock Corporation (Newport News), a Virginia corporation with principal offices, place of business, and shipyards in Newport News, Virginia, is engaged in the construction of combat vessels for the Navy. During the period relevant to this case, Newport News subcontracted with both Lukens and U.S. Steel for HY-steel plates for use in ship construction pursuant to prime contracts with the Navy. Newport News purchased substantial quantities of HY-steel plates from Lukens and U.S. Steel during this period,[5] of which a significant amount was used in the construction of the U.S.S. Nimitz and U.S.S. Eisenhower, two nuclear powered aircraft carriers.

The Navy and Newport News entered into fixed price incentive contracts during this period. It is important to note that under this type of contract, the Navy assumed the entire target or projected cost. If the total cost exceeded the target cost, then the additional cost was allocated between the Navy and the prime contractor according to a formula specified in each contract. If the total cost exceeded the target cost but not the ceiling price, the Navy bore the major portion

[3] "HY" stands for high yield; the number pertains to the number of pounds per square inch minimum yield strength.

[4] The following mills were approved by the Navy: U.S. Steel's mills in Homestead, Pennsylvania, and Gary, Indiana; Lukens' mill in Coatsville, Pennsylvania; Armco's mill in Houston, Texas; and Bethlehem's mill in Burns Harbor, Indiana.

[5] During this period, Lukens and U.S. Steel sold HY-steel plates to two other prime contractors of the federal government, Electric Boat Division of General Dynamics Corporation and Ingalls Shipbuilding Company of Litton Industries. Defendants also sold HY-steel plates to Defense Industrial Supply Center (DISC).

of the cost; the prime contractor would be responsible for the entire amount by which the final cost exceeded the ceiling price. However, if the final cost was less than the target cost, a percentage of the difference between the two costs would be awarded to the prime contractor as additional profit. *See, e.g.,* Exh. 11A, at 49.

In awarding subcontracts, Newport News utilized a competitive bidding system. It solicited bids for HY-steel plates by sending invitations to bid, which set forth the sizes, shapes, and quantities of steel to be purchased, to Lukens, U.S. Steel, and, at times, to Armco and Bethlehem. In response, each interested bidder would submit a bid [1187] to Newport News. Newport News awarded purchase orders on the basis of the bids received; thus, the bids were crucial to the determination of the award of the contract. It was the practice of Newport News to award the bid to the lowest bidder. Indeed, if Newport News did award a contract to a supplier other than the lowest bidder, it would risk the possibility that the Navy might not reimburse it for the cost of the steel.

Several provisions in the prime contract as well as in the procurement regulations gave the Navy authority to review Newport News' procurement system and individual contracts and otherwise regulate Newport News' subcontracting practices. In particular, the "consent to subcontracts" clause in the prime contract specifically provided the Navy's Supervisor of Shipbuilding with authority to approve individual purchases and to evaluate the overall procurement system. *See, e.g.,* Exhs. 11A, at 102-04; 11B, at 31-32. Price competition was one of the factors the supervisor was required to consider. He was also required to consider cost and pricing data if there was inadequate evidence of, *inter alia,* competition among the suppliers bidding on the subcontract or an established commercial position for the sale price of the product. The prime contracts obligated Newport News to provide cost and pricing data to the Navy.[6] *See, e.g.,* Exhs. 11A, at 115-16; 11B, at 32. In addition, a "competition in subcontracting" clause required Newport News to employ a competitive bidding procedure for subcontracts. *See* Exhs. 11C, at 49; 11D, at 43; 10 U.S.C. § 2304 (1970).

D. *Status of the Case.*

On June 30, 1976, United States Magistrate Lawrence S. Margolis, acting as a Special Master pursuant to Fed.R.Civ.P. 53 and this Court's order of April 25, 1975, set forth Findings of Fact and Con-

[6] Terry H. White, a contracting officer for the United States Navy at Newport News, testified that the Navy's consent to Newport News' projected purchase of HY-steel plates was withheld on several occasions. Tr. 43-44, 103. Mr. White concluded that, because of the identicality of bids, there was inadequate evidence of competition and cost and pricing data were therefore necessary. However, defendants U.S. Steel, Lukens, and Bethlehem refused to provide cost and pricing data.

clusions of Law on the threshold issue of whether the FTC's order in *American Iron and Steel Institute,* 48 FTC 150 (1951), covered HY-steel plates. The Special Master concluded that the HY-steel plates were "alloy steel plates" within the meaning of the order. The court adopted the findings and conclusions of the Magistrate on February 17, 1977, and set the case for trial.

II. Merits

A. *Plaintiff's Allegations.*

The FTC claims that the evidence when viewed as a whole, reveals a "planned common course of action" in violation of the order between defendants, among defendants and Newport News, and between Newport News, and each defendant. The FTC relies on the following facts to support its claim: (1) Between 1968 and 1971, the bids submitted by U.S. Steel and Lukens to Newport News were identical most of the time when freight to Newport News was added. (2) Newport News divided the awards of HY-steel bids between U.S. Steel and Lukens on approximately a 55 to 45 percentage basis. (3) Newport News did not award Bethlehem any HY-steel orders, even though Bethlehem, at times, submitted identical bids. (4) A contracting officer for the Navy at Newport News withheld consent on several proposed bid awards. (5) On twenty-three occasions during the five-year period, Newport News, after U.S. Steel and Lukens had submitted bids, telephoned each defendant on the price of several different items in the bid, and defendants subsequently revised their prices, with the result that defendants' bids were identical when freight to Newport News was added. (6) U.S. Steel's quotations to Newport News were derived from an internal price schedule which was intended to be competitive with Lukens' published prices and specification components price list. (7) Lukens generally followed [1188] the price changes of U.S. Steel. (8) Newport News provided U.S. Steel with information concerning Lukens' bidding. (9) Newport News, at times, advised one defendant of the other's price changes. (10) Newport News advised each defendant on a number of occasions that it must remain competitive in order to participate in the HY-steel business at Newport News. (11) When Armco submitted low bids, each defendant attempted to determine their expected participation rate.

Upon the basis of these and other facts, plaintiff requests the Court to draw the following inferences:
(1) Newport News facilitated price identicality at Newport News through a variety of communications with defendants. (2) When

Newport News informed defendants that they must remain competitive and defendants responded that they intended to remain competitive, competitive meant the same price. (3) U.S. Steel used Lukens' price list as a formula from which it prepared bids to Newport News. (4) Each defendant participated in the bidding at Newport News with the understanding that each would receive a fixed percentage of the awards. (5) When invited to submit lower prices in exchange for increased participation at Newport News, the defendants declined, even though contrary to their own business interests, and continued to submit identical bids.

B. *Applicable Law.*

The legal standard to be applied in this case is set forth in the order, which prohibits the steel companies, *inter alia:*

> I. . . . from entering into any planned common course of action, understanding, or agreement between any two or more of said respondents, or between any one or more of said respondents and others not parties hereto, and from cooperating in, carrying out or continuing any such planned common course of action, understanding or agreement to do or perform any of the following things:
>
> (1) Adopting, establishing, fixing, or maintaining prices or any element thereof at which steel products shall be quoted or sold . . ..
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> * * * * * * *
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> II. . . . from acting, individually or otherwise, so as knowingly to contribute to the maintenance or operation of any planned common course of action, understanding or agreement between and among any two or more of the respondents or between any one or more of them and others not parties hereto through the commission of any of the acts, practices or things prohibited by subparagraphs (1) through (6) of paragraph I of this order.

48 FTC at 152-54. In other words, the order prohibits participation in a planned common course of action or knowing contribution to a planned common course of action. *See* Pretrial Statement for Lukens Steel Company at 2.

[2] The consent order explicitly provides that "planned common course of action" be construed "as interpreted by the Supreme Court in *F.T.C.* v. *Cement Institute,* 333 U.S. 683, 68 S.Ct. 793, 92 L.Ed. 1010 and by the Court in *American Chain & Cable Co.* v. *F.T.C.* (C.A. 4th 1944), 139 F.2d 622." 48 FTC at 154. According to the Court in *FTC* v. *Cement Institute,* 333 U.S. at 728, 68 S.Ct. at 816, "planned common course of action"

> . . . is merely an emphatic statement that the Commission is prohibiting concerted action—planned concerted action. The Commission chose a phrase perhaps more readily understood by businessmen than the accompanying legal words of like import.

In *American Chain & Cable Co.* v. *FTC*, 139 F.2d at 624, the court construed an order containing the same language in the following manner:

> [T]o sustain a charge of violation of the order in this case it must be shown that the prohibited acts have been performed as the result of an agreement or conspir[1189]acy, or as the result of a common course of action, that has been agreed upon or planned between two or more persons.

Thus, it is clear that, in order to establish a violation of the order, there must be proof of concerted action.

[3-5] Section one of the Sherman Antitrust Act, 15 U.S.C. § 1 (1976), which prohibits contracts, combinations, and conspiracies in restraint of trade, requires proof of concerted action as well. As one commentator has stated, section one "presents a single concept about common action, not three separate ones: 'contract . . . combination or conspiracy' becomes an alliterative noun, roughly translated to mean 'concerted action.'" L. Sullivan, *Handbook of the Law of Antitrust* 312 (1977). Therefore, the Court is appropriately guided by cases arising under section one.[7]

[6] It is well settled that concerted action may be established by circumstantial evidence. *See Norfolk Monument Co.* v. *Woodlawn Memorial Gardens, Inc.*, 394 U.S. 700, 704, 89 S.Ct. 1391, 22 L.Ed.2d 658 (1969); *Theatre Enterprises, Inc.*, v. *Paramount Film Distrib. Corp.*, 346 U.S. 537, 540, 74 S.Ct. 257, 98 L.Ed. 273 (1954). Neither direct evidence nor evidence of an express agreement is necessary. *See Interstate Circuit, Inc.* v. *United States*, 306 U.S. 208, 221, 59 S.Ct. 467, 83 L.Ed. 610 (1939); *Eastern States Retail Lumber Dealers' Ass'n* v. *United States*, 234 U.S. 600, 612, 34 S.Ct. 951, 58 L.Ed. 1490 (1914).

[7, 8] An inference of concerted action is warranted where the totality of circumstances reveals a "unity of purpose or a common design and understanding, or a meeting of the minds in an unlawful arrangement." *American Tobacco Co.* v. *United States*, 328 U.S. 781, 810, 66 S.Ct. 1125, 1139, 90 L.Ed. 1575 (1946). In making this determination, a court must consider the evidence as a whole rather than view the papers and exhibits in isolation. *See C-O-Two Fire Equip. Co.* v. *United States*, 197 F.2d 489, 494 (9th Cir.), *cert. denied*, 344 U.S. 892, 73 S.Ct. 211, 97 L.Ed. 690 (1952).

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[7] Only one additional issue pertaining to the specific terms in the order was raised. The order extends to "any planned common course of action, understanding, or agreement between any two or more of said respondents and others not parties hereto . . .." Defendant Lukens contends that Newport News, a customer, is not within the meaning of "others not parties hereto." The Court finds this argument unpersuasive. The Supreme Court in *FTC* v. *Cement Institute*, 333 U.S. 683, 728, 68 S.Ct. 793, 817, 92 L.Ed. 1010 (1948), interpreted identical language to include "others outside the industry who are not parties to this proceeding."

[9] "Concerted action" may be inferred from evidence of parallel business behavior. However, as established in *Theatre Enterprises, Inc.* v. *Paramount Film Distrib. Corp.*, 346 U.S. 537, 541, 74 S.Ct. 257, 259, 98 L.Ed. 273 (1954) (footnote omitted), conscious parallelism alone is not sufficient to establish an antitrust conspiracy:

> [T]his Court has never held that proof of parallel business behavior conclusively establishes agreement or, phrased differently, that such behavior itself constitutes a Sherman Act offense. Circumstantial evidence of consciously parallel behavior may have made heavy inroads into the traditional judicial attitude toward conspiracy; but "conscious parallelism" has not yet read conspiracy out of the Sherman Act entirely.

The Court of Appeals for the Ninth Circuit articulated this view in more concrete terms:

> The mere fact that two or more of the defendants dealt with plaintiff in a substantially similar manner does not support an inference of conspiracy, even though each knew that the business behavior of another or the others was similar to its own. *Theatre Enterprises, Inc.* v. *Paramount Film Distrib. Corp.*, 346 U.S. 537, 540-541, 74 S.Ct. 257, 98 L.Ed. 273 (1954). Like businesses are generally conducted alike and, as the trial judge correctly stated, similarity in operations lacks probative significance unless present "under circumstances which logically suggest joint agreement, as distinguished from individual action." See *Fox* [1190] *West Coast Theatres Corp.* v. *Paradise Theatre Bldg. Corp.*, 264 F.2d 602 (9th Cir. 1958).

Independent Iron Works, Inc. v. *United States Steel Corp.*, 322 F.2d 656, 661 (9th Cir.), *cert denied*, 375 U.S. 922, 84 S.Ct. 267, 11 L.Ed.2d 165 (1963). *See Joseph E. Seagram & Sons, Inc.* v. *Hawaii Oke Liquors, Ltd.*, 416 F.2d 71, 85 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062, 90 S.Ct. 752, 24 L.Ed.2d 755 (1970).

[10] Clearly, parallel pricing alone is insufficient to establish an antitrust violation. In fact, price identity may be the expected and normal result when the product is identical or fungible, even though there is no agreement and the costs for the participating companies are not the same. *See Cement Mfrs. Protective Ass'n* v. *United States*, 268 U.S. 588, 605-06, 45 S.Ct. 586, 69 L.Ed. 1104 (1925);[8] *Independent Iron Works, Inc.* v. *United States Steel Corp.*, 322 F.2d 656, 665 (9th Cir.), *cert. denied*, 375 U.S. 922, 84 S.Ct. 267, 11 L.Ed.2d 165 (1963);[9] L. Sullivan, *Handbook of the Law of Antitrust*

[8] A great volume of testimony was also given by distinguished economists in support of the thesis that, in the case of a standardized product sold wholesale to fully informed professional buyers, as were the dealers in cement, uniformity of price will inevitably result from active, free and unrestrained competition; and the Government in its brief concedes that "undoubtedly the price of cement would approach uniformity in a normal market in the absence of all combinations between the manufacturers."

268 U.S. at 605-06, 45 S.Ct. at 592.

[9] Similarity of prices in the sale of standardized products such as the types of steel involved in this suit will not alone make out a prima facie case of collusive price fixing in violation of the Sherman Act, the reason being that competition will ordinarily cause one producer to charge about the same price that is charged by any other.

322 F.2d at 665.

318 (1977). Indeed, additional or "plus factors"[10] have been present in all parallel pricing cases in which an antitrust conspiracy has been found. *See, e.g., Interstate Circuit, Inc.* v. *United States,* 306 U.S. 208, 59 S.Ct. 467, 83 L.Ed. 610 (1939).

Although the nature and extent of the "plus factors" necessary to warrant an inference of concerted action from evidence of parallel business behavior have not been precisely delineated, the Court of Appeals for the Third Circuit has recently set forth factors considered important in establishing such an inference. *See Bogosian* v. *Gulf Oil Corp.,* 561 F.2d 434, 436 (3d Cir. 1977), *cert. denied,* 434 U.S. 1086, 98 S.Ct. 1208, 55 L.Ed.2d 791 (1978); *Venzie Corp.* v. *United States General Products Co.,* 521 F.2d 1309, 1314-15 (3d Cir. 1975). First, there should be evidence that defendants acted contrary to their economic self-interest. Absent such evidence, parallel behavior would not necessarily be evidence of an agreement in violation of the antitrust laws, since the parallel action could have resulted from an independent individual decision. *See Venzie Corp.* v. *United States General Products Co.,* 521 F.2d at 1314, *citing* Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal,* 75 Harv.L.Rev. 655, 681 (1962). Second, there should be evidence of defendants' motivation to enter into an agreement. The Court in *Bogosian* v. *Gulf Oil Corp.,* 561 F.2d at 446, stated that proof of these circumstances would "make the inference of rational, independent choice less attractive than that of concerted action."

The Third Circuit's analysis appears to distill accurately the pertinent case law. For example, the Court in *Theatre Enterprises, Inc.* v. *Paramount Film Distrib. Corp.,* 346 U.S. 537, 74 S.Ct. 257, 98 L.Ed. 273 (1954), focused upon facts evidencing rational independent business reasons as an explanation for parallel conduct. *See C-O-Two Fire Equip. Co.* v. *United States,* 197 F.2d 489 (9th Cir.), *cert. denied,* 344 U.S. 892, 73 S.Ct. 211, 97 L.Ed. 690 (1952). In *First Nat'l Bank* v. *Cities Service Co.,* 391 U.S. 253, 287, 88 S.Ct. 1575, 20 L.Ed.2d 569 (1968), the Court, in discussing and distinguishing *Interstate Circuit, Inc.* v. *United States, supra,* emphasized the fact that all conspirators had the same motive to enter [1191] into an agreement. Another court has noted that an inference of concerted action is more likely where there are many co-conspirators within a non-oligopolistic industry. *See Delaware Valley Marine Supply Co.* v. *American Co.,* 297 F.2d 199 (3d Cir. 1961).

[11] These cases, particularly *Bogosian* v. *Gulf Oil Corp., supra,* guide this Court in making the ultimate determination: Whether the

[10] *See C-O-Two Fire Equip. Co.* v. *United States,* 197 F.2d 489 (9th Cir.), *cert. denied,* 344 U.S. 892, 73 S.Ct. 211, 97 L.Ed. 690 (1952).

evidence reveals conduct that could be explained by rational, independent business behavior or could only make sense in the context of the behavior of others. If the latter is true, and the behavior makes sense only if each defendant's competitors behave in a similar fashion, then the inference of concerted action is clearly warranted.[11]

C. *Evaluation of the Evidence.*

The fundamental issue before the Court is whether concerted action can be inferred from the evidence of record. Indeed, the parties do not, for the most part, disagree over the facts but rather over the inferences to be drawn from the facts.

The FTC alleges that each defendant, in violation of the order, engaged in a common course of action with (1) the other; (2) the other and Newport News; and (3) Newport News in connection with the submission of HY-steel bids to Newport News. The Court therefore will address separately the charges against each alleged combination.

1. *Planned Common Course of Action between Lukens and U.S. Steel*

[12] Only a part of the evidence of record pertains to the allegation of a two-party combination between defendants: Much of the evidence adduced by plaintiff relates only to the alleged three-party combination among defendants and Newport News. This evidence pertains to factual situations over which Newport News had control or played a significant role. For example, the division of bids between U.S. Steel and Lukens on a fifty-five to forty-five percentage basis could only be accomplished through the direction of Newport News. Similarly, Newport News was the central participant in the price corrections and limited communication of price information.

The Court will consider first the evidence pertaining only to the alleged two-party combination. Plaintiff relies on the following facts and inferences to support its claim against Lukens and U.S. Steel: U.S. Steel's withdrawal of its published price lists; U.S. Steel's use of Lukens' published price lists in developing a formula; Lukens' change in classification of HY-steel plates; and Lukens' practice of following U.S. Steel's price increases or decreases. The Court will analyze each of these facts and inferences seriatim.

A U.S. Steel official explained, in a memorandum summarizing the pricing policies over the years, that U.S. Steel withdrew its published price lists in response to investigations by the GAO and FTC of HY-

[11] It is noted that in most of the cases discussed above, the courts were considering whether there was sufficient evidence merely to get the case to the jury rather than whether the evidence was sufficient to justify a finding for the plaintiff.

steel procurement practices. U.S. Steel intended that this action would alleviate the problem of price identicality. *See* Exh. 194. Moreover, of the four qualified steel companies, only Lukens published HY-steel prices. Finally, there is no evidence that the motive for U.S. Steel's decision was to facilitate price-fixing or that it was based on joint action.

Even if the Court were to accept plaintiff's most extreme representation of the fact that U.S. Steel adjusted to Lukens' published price list in order to be competitive with Newport News, *i.e.*, that U.S. Steel used Lukens' prices to develop a formula, there is no evidence of any concerted action in regard to this practice. It does appear that U.S. Steel utilized an internal price list that reflected a price competitive with Lukens' prices. U.S. Steel received limited information from its customers, including Newport News, concerning the prices of Lukens, Bethlehem, and Armco. U.S. Steel's price at Newport News was [1192] derived from the information on Lukens' price, adjusted for the difference in freight rates between Homestead, Pennsylvania and Newport News, Virginia and Coatesville, Pennsylvania and Newport News. However, U.S. Steel's attempts to determine Lukens' price seem to be individual action. Independent efforts to ascertain competitors pricing were in its best interest, particularly since it knew that the awards at Newport News were made on the basis of the lowest bids. The evidence of U.S. Steel's adjustment for freight reveals nothing more than freight absorption independently pursued which is expressly permitted by the order. The price sheets in U.S. Steel files, evidencing attempts by U.S. Steel employees to reconstruct Lukens price lists, are further evidence that U.S. Steel's attempt to approximate Lukens' prices was independently pursued.

Lukens' decision in May, 1966 to change the classification of HY-steel plates also appears to be an independent decision. It apparently was an attempt by Lukens to resolve the problem of identical bids raised by the GAO investigation. *See* Tr. 328. The evidence does not reveal that Lukens' practice of following price increases or decreases announced by U.S. Steel was a product of concerted action. The changes that Lukens followed were often those adopted by the other major steel producers (Armco and Bethlehem) as well.

Plaintiff also focuses on the failure of the steel companies to submit cost and pricing data, as required by federal statute and the prime contract between the Navy and Newport News. The Court finds, however, that no inference can be based on this fact. First, there is no evidence that Lukens' or U.S. Steel's refusal to submit cost and pricing data was a product of concerted action. Indeed, Bethlehem also refused to submit such data. Lukens concluded that, because it published prices, it had sufficiently complied with the requirement. Although U.S. Steel objected to submitting such data to Newport

News, a private customer, it informed the Navy that it would supply the Navy with the data on a confidential basis.

The FTC also alleges that defendants, contrary to their self-interest, failed to submit a lower bid in exchange for increased participation at Newport News. It first notes Newport News' invitation to U.S. Steel to bid on the remaining requirements for the U.S.S. Nimitz, if U.S. Steel would quote prices lower than Lukens' published prices. U.S. Steel contends that its decision not to quote lower prices reflects its judgment that quotation of lower prices would be unprofitable in light of its costs and profit objectives. This explanation is no less plausible than that which the FTC proposes. U.S. Steel further notes that this decision cannot be compared with its decision in May, 1972 to submit a bid to Electric Boat lower than Lukens' published price list: Because Newport News purchased black plates (plates that were not cleaned, painted, or ultrasonically tested), and Electric Boat bought finished plates (plates that were cleaned, painted, and ultrasonically tested), different cost structures and profit and pricing considerations were involved. The FTC failed to submit any concrete evidence, such as cost and pricing data, to support its claim that U.S. Steel's refusal to lower its bid at Newport News was contrary to its self-interest, and thus the plaintiff failed to sustain its burden of proof on this issue.

The FTC similarly alleges that Lukens declined to lower its bid in response to an invitation of Tenneco, Inc., Newport News' parent corporation, for the total 1972 HY-steel requirements. The evidence reveals that Tenneco invited bids on all or any portion of Tenneco's major component companies' requirements for all steel products. This offer was not made at a time when Lukens was experiencing depressed demand, as the FTC alleges, but rather was made during an average year for Lukens. Lukens found this offer unattractive for two reasons. First, Newport News' practice was to place numerous small orders, because it had limited storage facilities furnishing protection from the weather. Tenneco did not give Lukens any assurance that this method of placing orders would be changed. Second, Newport News bought [1193] black (unfinished) plates; when the order was for finished plates, Lukens had an opportunity to make greater profit. Lukens reduced its existing prices on two occasions, one involving Defense Industrial Supply Center and the other involving Electric Boat, in order to secure a large procurement of HY-steel. Lukens, in explaining these incidents, noted the opportunity for greater profit. Moreover, the price reduction, rather than a one-shot effort to obtain a large order, applied to all existing and future orders. The Court therefore finds that Lukens' explanation is as likely as that offered by the FTC.

Plaintiff also alleges that there was direct exchange of information on price changes. Lukens did purchase from alloy producers, including U.S. Steel, and thus its purchasing department could receive some pricing information. Although Lukens received word of a price change from U.S. Steel through its purchasing department on three occasions, this information merely confirmed information previously received. Lukens usually obtained information on price changes through trade journals or its customers. There is no evidence of any price discussions, opportunity for price discussions between defendants,[12] or any other facts upon which an inference of price exchange could be based.

The Court concludes that, upon an examination of the evidence as a whole, there is insufficient evidence of the "plus factors" necessary to warrant an inference of concerted action between the defendant steel companies. The actions of each defendant appear to be based upon independent judgment, a consideration of the defendant's own business interest, and an assessment of the competition presented by the other at Newport News.[13] The Court therefore finds that the defendants acting alone have not violated the order.

2. *Planned Common Course of Action Among Newport News and the Defendants*

The Court must now determine whether a planned common course of action in violation of the order has been established against Newport News and the defendants. As the Court noted earlier, most of the evidence of record involves actions, decisions, and communications of Newport News. The crucial question is whether these actions were based on independent judgment or were a product of concerted action and therefore part of a planned common course of action.

The actions of Newport News relevant to this claim can be divided into two categories. The first category involves Newport News' practice in awarding bids. The second involves communications by Newport News to an individual defendant concerning price.

a. Division of Awards by Newport News.

The facts most pertinent to the first category are (1) Newport News' division of awards between U.S. Steel and Lukens on approximately a fifty-five to forty-five percentage basis; and (2) the failure of

[12] Plaintiff's reliance on a meeting, which was primarily concerned with metallurgical matters, is insufficient. The meeting, attended by representatives from Penn Galvanizing, Electric Boat (a competitor of Newport News), and Alan Wood Steel Company (which does not produce HY-80 and HY-100 steel plates), occurred ten days subsequent to U.S. Steel's public announcement of the withdrawal of prices.

[13] These actions are clearly distinguishable from those in *Interstate Circuit, Inc.* v. *United States*, 306 U.S. 208, 226, 59 S.Ct. 467, 83 L.Ed. 610 (1939). The actions of the defendants in that case were most rationally explained when considered in light of the similar behavior of their competitors.

Newport News to award Bethlehem and HY-steel orders, even though Bethlehem, at times, submitted bids identical to those submitted by U.S. Steel and Lukens.

The division of awards between U.S. Steel and Lukens was premised, in part, upon Newport News' desire to avoid dependence on a single supplier. HY-steel plates are a critical element in the production of combat vessels for the Navy. Newport News was apprehensive that, in the event of a national disaster or labor strike, its primary reliance on one supplier could cause delay in production. The purpose of [1194] Newport News' policy of maintaining multiple sources of supply was to assure a steady supply during times of emergency. Newport News also believed that it would be easier to obtain steel in times of emergency from a company that was an established supplier of this specialized product, HY-steel. Newport News thus attempted to establish a good rapport with its suppliers; it hoped that such a relationship would facilitate earlier delivery or accommodation upon short notice.

Newport News, in defending its failure to award orders to Bethlehem even though Bethlehem at times submitted identical bids,[14] stated that there was nothing to be gained by adding a new, untried supplier at no price advantage. It stated that it attempted to get Bethlehem to underbid U.S. Steel and Lukens and break the market between U.S. Steel and Lukens.[15] Newport News contended that three identical bidders would not be an advantage since it would not break the market.

The FTC contends, however, that Newport News' award practices are evidence of its central role in the price maintenance scheme. According to the FTC, Newport News agreed to divide the awards between U.S. Steel and Lukens if the two steel companies would submit identical bids. The FTC claims that Newport News entered into this arrangement to assure a steady supply of HY-steel at all times; U.S. Steel and Lukens agreed to bid uniformly in order to be assured a percentage of the awards at Newport News.

b. Communications of Newport News to Each Defendant.

The FTC contends that the evidence demonstrating that Newport News gave each of the defendants information on HY-steel prices

[14] The fact that Bethlehem's bids were at times identical to those of U.S. Steel and Lukens undercuts to some extent the implication that identical bidding resulted from the concerted action of the defendants, the defendants and Newport News, or Newport News and each defendant.

[15] Daniel F. Galvin, assistant purchasing agent (1963 1971) and presently director of material acquisition for Newport News stated in his deposition:

> I told Bethlehem Steel at this point we were trying to break the market between U.S. Steel and Lukens. We invited Bethlehem Steel to bid and we tried to get them in the business. But when we received identical bids at this point [sic] was the time if you were going to break anything, it was to break it in the beginning and we told them that we don't need identical bids.

Tr. 1868.

strengthens the inference of concerted action. The FTC claims that Newport News provided U.S. Steel with general information on Lukens' pricing system, advised Lukens of U.S. Steel's price announcement, and, on occasion, conveyed information on particular bids. Newport News allegedly would tell each defendant that in order to participate in the business at Newport News, it must remain competitive. Finally, the FTC focuses on Newport News' practice of checking prices after a bid was submitted but prior to the award.

Much of the evidence offered to support these allegations involves events that occurred prior to the statute of limitations period. Plaintiff contends that these events, which occurred during the early stages of the alleged conspiracy, reveal the understanding that arose among the parties and shed light on the subsequent behavior of the parties.

It appears from the evidence that Newport News on occasion did engage in the above practices. At times, Newport News would discuss in a general way one defendant's pricing system with the other. After Lukens adopted a new pricing system in mid-June, 1966, Newport News notified U.S. Steel that it would have to be competitive with the new price schedule if it wished to continue to participate in the business at Newport News. *See* Exh. 212A. U.S. Steel responded that it intended to be competitive for "this good account." *See* Exh. 212B. In late 1965 and early 1966, Newport News advised U.S. Steel that its prices were $.20 per pound higher than Lukens' prices computed on a delivered basis, that U.S. [1195] Steel must be competitive to continue participation, and that Lukens continued to use published prices that had been in effect for some time. In early February, 1966, Newport News expressed its displeasure over U.S. Steel's failure to quote a competitive price. Newport News stated that it neither had the time nor the resources to check each price on each order to determine if U.S. Steel was competitive. It requested that U.S. Steel's price be competitive on the first round. *See* Exh. 211C. Very shortly thereafter, Newport News told U.S. Steel that unless it was advised otherwise, Lukens' current mill prices were the same as U.S. Steel's prices prior to the withdrawal of its price lists. *See* Exh. 211D. Newport News further informed U.S. Steel that its prices were $.20 per pound too high due to higher transportation prices from its Homestead plant. U.S. Steel responded that it would be competitive on orders not exceeding $100,000.00. *See* Exh. 211E.

Lukens received relatively little information from Newport News concerning U.S. Steel's general pricing system for HY-steel plates. At the end of March, 1966, Newport News informed a Lukens' sales representative that U.S. Steel "was quoting lump prices on inquiries all or nothing." Exh. 153. Lukens then determined that U.S. Steel's prices were lower than its prices. Also, in May, 1966, Newport News

showed a Lukens' sales representative U.S. Steel's bid on the last order.

Newport News in a few instances communicated more specific information on particular bids. Plaintiff notes two instances in which Newport News advised U.S. Steel that specific bids for particular size plates were $1.50 per pound high. U.S. Steel in one case, reduced its price in future quotations. *See* Exh. 190P, at 1. In the other case, U.S. Steel reduced its price by $1.50 per pound on the relevant plate size thirteen months later. *See* Exh. 190R(1). In June, 1962, U.S. Steel, after learning from Newport News that Lukens had lowered its prices on certain plates, adjusted its price to be competitive with Lukens' price. *See* Exhs. 244; 190S. After Newport News, in April, 1968, provided U.S. Steel with pricing information from Lukens' component specification sheet,[16] U.S. Steel revised its price to be competitive with Lukens' prices. *See* Exhs. 190I(2); 190I(3). Finally, the FTC notes that U.S. Steel increased its price on plates over three inches, after it received information from Newport News that Lukens charged for double quenching and tempering on HY-steel plates over three inches instead of only on plates over four inches. *See* Exh. 190L, at 1.

The specific price information that Newport News conveyed to Lukens concerned whether and when U.S. Steel planned to adopt a price change. In four of the five instances cited by plaintiff, Newport News advised Lukens either that U.S. Steel was not increasing its prices, that U.S. Steel's price increase was effective at a later date than Lukens' announced increase, or that Lukens was not competitive. In these cases, Lukens lowered its price to be competitive. In the other incident cited by plaintiff, Newport News informed Lukens that U.S. Steel would raise its alloy price effective July 28, 1969. Lukens subsequently notified Newport News that its prices would be increased effective July 28, 1969. However, it added that it heard reports that it might not then be competitive with at least one supplier. It assured Newport News that, while it considered a price increase necessary, it intended, in the final analysis, to be competitive. *See* Exh. 126.

When he was Newport News' steel buyer (late 1967 through 1973), Leonard M. Outland would on occasion, after submission of bids but prior to the award, call defendants to question prices on bids. Mr. Outland would check bids after either a comparison of a bid with an earlier bid involving a plate of the same size or a comparison of competitors' bids. He would telephone either Luk[1196]ens' service representative in Richmond, Eileen T. Tyler, or U.S. Steel's service representative in Baltimore, Richard F. Chase, or both to check items

[16] Component specification sheets, which provided prices for extra services such as testing, double quenching and tempering ultrasonic testing, and painting, were sent to the Navy, Newport News, and Electric Boat, and to other HY-steel customers only upon request.

or prices submitted on a particular bid. If Outland checked with both defendants on bids for the same order, he usually questioned the defendants on different items. Typically, one or both of the defendants would correct the price of the questioned item or items on the bid. After corrections were submitted by one or both defendants, the bids would be identical when freight to Newport News was added to their bids.

Plaintiff documents twenty-three instances involving price corrections and subsequent identical bids during the statutory five-year period. However, the evidence does not show that a telephone call from Mr. Outland preceded all of these price corrections. During this period, 25,000 to 30,000 quotations for steel products passed across Outland's desk. The evidence reveals that some of the corrections ultimately resulted in decreases in the prices for these items.

The defendants admit that Outland would on occasion call to check prices. However, they claim that such price checking was not illegal but rather normal business behavior for a customer and supplier. They contend that sometimes errors were made in their bid submissions. Some mistakes were caused by a misquotation and others by the incorrect addition of the various components. They also point out that a contracting officer is required, pursuant to the Armed Services Procurement Regulations, 32 C.F.R. §§ 2-406.1 to 2-406.3 (1976), to verify prices if there is an apparent mistake. Finally, Lukens notes that Newport News could easily detect a mistake in Lukens' quotations. Newport News would have reason to check on a deviation from published prices, since they knew that Lukens generally adhered to published prices. Lukens preferred to be made aware of a mistake before the award of the contract, since it would bill the customer on the basis of its published prices. The discovery of the error prior to the award would avoid later problems with the customer.

Plaintiff maintains that the price verification served as a merchanism to maintain prices. It contends that such mistakes were not apparent mistakes to which the Armed Services Procurement Regulations refer.

c. Role of Defendants in Three-Party Concerted Action.

Each defendant was aware of the approximate percentage of the awards it had received over the years. When Armco began submitting lower bids and therefore receiving awards at Newport News in 1972, both U.S. Steel and Lukens attempted to ascertain Armco's pricing system and the percentage of awards it had received. Both parties received some information in this regard. U.S. Steel maintained figures on its participation rate. Lukens, at one point, asked Newport News what participation rate it could expect at Newport

News if it contained its current pricing policies or if it bid competitively with Armco. Newport News informed Lukens that its participation rate would decrease if it were not competitive with Armco.[17]

The FTC maintains that in addition to seeking information concerning participation rates from Newport News, the defendants cooperated with Newport News and thus furthered the price-fixing scheme. It further contends that this evidence and that offered in support of the two-party concerted action claim, *see* section IIC.1 above, when viewed as a whole, support an inference of concerted action.

d. Whether the Evidence Supports an Inference of Concerted Action.

The FTC urges the Court to adopt the inferences it draws from the evidence, and from these inferences, reach the ultimate [1197] inference of concerted action among Newport News, U.S. Steel, and Lukens. The FTC infers that during the early stages of the conspiracy, the parties established a complicated system of communication from which each party understood the role it played in the scheme and the results of such a scheme. For example, the FTC contends that the defendants understood that, when Newport News informed them that they must remain competitive, competitive meant the same price. The FTC infers that U.S. Steel, based on information supplied by Newport News, utilized Lukens' prices as a formula upon which U.S. Steel based its bid to Newport News. The FTC infers that Newport News would advise Lukens of U.S. Steel price changes so that Lukens could adjust to U.S. Steel's planned changes. According to the FTC, Newport News used several other mechanisms in an effort to eliminate bid differences. The price verification by Newport News and subsequent revision by the defendants as well as the communication, on a few occasions, of the amount by which a bid was not competitive, increased the incidence of identicality. The FTC infers that defendants began to rely upon Newport News to notify them of any price differences in the bids. It also infers that each defendant was aware of its participation rate at Newport News and knew that it could expect to continue to participate at such a rate if each defendant submitted competitive or identical bids. It further infers that each defendant, when Newport News offered it increased participation in exchange for lower bid submissions, declined to reduce its prices; each defendant continued to submit identical prices, even though contrary to its self-interest.

[17] On February 8, 1973, Lukens informed Newport News that it would discontinue submitting bids on HY-steel plates. It made this decision, even though it was still receiving orders from Newport News and expected to continue to receive orders on plates that Armco could not produce.

The FTC claims that the evidence supports the conclusion that Newport News, in effect, agreed to allocate the awards between Lukens and U.S. Steel in exchange for the defendants' agreement to bid identically. It contends that, based on the evidence of record and the inferences that it draws from the evidence, an inference of conspiracy is warranted.

[13] For the reasons set forth below, the Court concludes that an inference of conspiracy is not warranted in this case. As the Court of Appeals for the Third Circuit held, an inference of concert may be warranted when there is evidence of (1) motivation to enter into an agreement and of (2) acts in contradiction of each party's economic self-interest. *See Bogosian* v. *Gulf Oil Corp.*, 561 F.2d 434, 446 (3d Cir. 1977), *cert. denied*, 434 U.S. 1086, 98 S.Ct. 1280, 55 L.Ed.2d 791 (1978). The plaintiff has failed to provide sufficient evidence in support of either of these factors.

[14] After a searching inquiry into this extensive record, the Court is unable to find evidence from which a plausible motive of Newport News may be inferred. The Court finds it incredible that Newport News, solely because it wanted to secure a steady supply of HY-steel in case of emergency, would risk possible antitrust prosecution and jeopardize a contract with the Navy involving over two billion dollars. It is unlikely that Newport News would subject itself to such risks solely to provide for a purely hypothetical supply shortage.[18]

Moreover, it would not be in Newport News' self-interest to participate in an arrangement that resulted in higher than competitive prices. While it might be in the interest of defendants to agree to submit higher than competitive bids, such an agreement would diminish Newport News' profits. Under the terms of the fixed price incentive contract entered into between the Navy and Newport News, if the final cost were less than the projected cost, Newport News would receive a percentage of the difference between the two costs. The FTC has failed to proffer any credible evidence of motivation for Newport News to enter [1198] into an agreement to maintain prices in violation of the order.

In addition, the Court concludes that the evidence concerning bid awards and price communications appears to be in the economic self-interest of Newport News and therefore a product of unilateral action rather than of concerted action among the defendants. Newport News' division of the awards between the two companies clearly furthers its own economic interest. It hoped to receive priority treatment from the two companies during times of emergency, because it

[18] This is not to say that Newport News had no motivation to attempt to assure itself of a steady supply of HY-steel during periods of shortage. While this was an interest of Newport News, it was not of such importance that it would risk possible antitrust liability. Furthermore, Newport News found it unnecessary to engage in any concerted action to achieve a steady supply. *See* text at 1197 *infra*.

had awarded a large percentage of its orders to and established a good relationship with both companies. It appears from the record that the failure to award bids to Bethlehem resulted from an independent decision of Newport News: Plaintiff has failed to submit any evidence that demonstrates the steel companies' involvement in this decision.[19]

Similarly, the various price communications by Newport News, rather than being contrary to self-interest, appear to advance its economic self-interest. More often than not, the communications led to a reduction in the price of a bid. For example, Lukens at times altered its published prices, which resulted in lowered prices, and U.S. Steel subsequently met the lowered price. Lukens, when informed that U.S. Steel was not announcing a price increase or was announcing it at a later date, would decide not to announce or to postpone the price increase. Some of the price information that Newport News transmitted merely corroborated information defendants had already obtained from other sources, including other customers of Lukens and U.S. Steel. Lukens' published alloy steel plate prices and its price announcement were distributed to its customers. Most of the communications merely reflect Newport News' continuing effort to lower the price of the bids it received, although these efforts were not always successful.[20]

Moreover, the Court concludes that even the tactics that seem most questionable, the price verifications by Newport News after submission of bids but prior to award, are premised upon unilateral action. The Armed Services Procurement Regulations provide:

> After the opening of bids, contracting officers shall examine all bids for mistakes. In cases of apparent mistakes, and in cases where the contracting officer has reason to believe that a mistake may have been made, he shall request from the bidder a verification of the bid, calling attention to the suspected mistake.

32 C.F.R. § 2-406.1 (1976). Even though some of the mistakes may not have been readily apparent, the contracting officer may well have had reason to believe that a mistake had been made through a comparison of bids with previous bids as well as by comparing one competitor's bid with another. In any event, the evidence does not demonstrate that the price verification and price corrections resulted from the concerted actions of the parties. Newport News' decision to

[19] However, Newport News' contention that the submission of identical bids by a third supplier would not be in the economic interest of Newport News, since it would not alleviate the identicality problem, is unpersuasive, particularly in light of the fact that Newport News was concerned about the difficulty of maintaining a steady supply.

[20] Newport News often informed the defendants that in order to participate in future business at Newport News, they must remain competitive. The evidence reveals that on at least one occasion, Newport News notified Lukens that it was not competitive on specific items and further inquired whether it would meet the competitor's price. *See* Exh. 424B, at 5. This inquiry, although contrary to the general practice of Newport News not to contact a steel company and ask it to meet another company's price on HY-steel plates, was neither contrary to its self-interest nor a product of concerted action.

check prices appears to have been independently motivated. Finally, plaintiff points to twenty-three instances of price corrections and subsequent price identity during the five-year period. When considered in light of the fact that the prices of bids often decreased after corrections and that Newport News received 4,000 to 6,000 orders for steel products per year, [1199] these instances of price correction do not appear to be significant or a device utilized by the three parties to assure price identity.

The actions of Lukens and U.S. Steel, even when considered along with the actions of Newport News, appear to be based on unilateral action. While the bids of Lukens and U.S. Steel were identical a substantial amount of the time, Bethlehem at times also submitted bids identical to the defendants' bids. This suggests that the bid identity may well be explained by legitimate business reasons. Indeed, as discussed earlier, where the product is standardized or fungible, even if specially produced by only a few companies, price identity may be the natural result.

While it was the ultimate policy of both U.S. Steel and Lukens to bid competitively at Newport News, each defendant used different pricing methods. Lukens' general policy was to adhere strictly to published prices. When Lukens learned of a price announcement or change by another major producer, its decision to announce a price change was often affected. Although Lukens' price changes were usually identical to those of U.S. Steel, Lukens, in determining price changes, considered many other factors, including the behavior of the other major producers and conditions within the industry. Lukens received information about the other producers' price changes from customers other than Newport News (*i.e.,* Westinghouse, Sunnyvale, Wyatt Industries, and Mosher Steel), as well as Newport News and from trade journals.

The policy of U.S. Steel, after it withdrew its published prices in 1965, was to quote a lump sum price based on the size and attractiveness of the inquiry. In determining this price, U.S. Steel considered, among other things, the bids of its competitor, Lukens. U.S. Steel attempted to obtain information on Lukens' prices from Newport News and other customers as well as from an examination of awards in public bidding. Finally, in order to be competitive at Newport News, U.S. Steel absorbed the difference in freight rates between U.S. Steel's mills to Newport News and Lukens' mill to Newport News. Freight absorption was independently pursued by U.S. Steel and is expressly permitted by the order. U.S. Steel thus independently developed an internal price list that reflected a price competitive with Lukens' prices.[21]

[21] U.S. Steel utilized a different internal price list for bids to government agencies under $100,000 and for bids to customers other than shipyards under 50 tons, and after September, 1968, under 40,000 pounds. The Court finds nothing irregular about this pricing system.

Finally, the Court finds unconvincing the FTC's reliance on the defendants' attempt to ascertain their participation rate at Newport News. Indeed, each defendant independently attempted to approximate the amount of business it could expect to receive. Understandably, when Armco began receiving orders in 1971, the defendants' concern over their participation rate increased. For example, as noted earlier, Lukens inquired of Newport News what participation it could expect at Newport News if it should continue its current pricing policy or if it should become competitive with Armco. Newport News responded that Lukens should become competitive or suffer a lower participation rate. It appears to the Court that defendants' concern and inquiries about participation rate reflect normal business behavior. Similarly, Newport News' responses reflect the actions of an independent purchaser seeking the lowest competitive price rather than those of a co-conspirator.

The Court therefore concludes, after evaluation of hundreds of documents and about 2,000 pages of testimony, that the actions and policies of Newport News, Lukens, and U.S. Steel were based on independent, rational business decisions. Plaintiff has failed to present adequate evidence either of motive to enter into an agreement or of acts, which if pursued by one party alone, would be contrary to its self-interest. The evidence fails to support an inference of concerted action among Newport News and the defendants. **[1200]**

3. *Planned Common Course of Action Between Newport News and Lukens or Between Newport News and U.S. Steel*

[15] Having concluded that plaintiff has failed to prove that defendants Lukens and U.S. Steel or the defendants and Newport News engaged in a planned common course of action to violate the order, the Court must necessarily find that plaintiff has failed to prove a planned common course of action between Newport News and Lukens or Newport News and U.S. Steel. Accordingly, the Court holds that plaintiff FTC has failed to prove by a preponderance of the evidence that defendants Lukens and U.S. Steel, or either of them, have violated any of the terms of the order in *American Iron & Steel Institute*, 48 FTC 150 (1951).

FEDERAL TRADE COMMISSION v. DAVID ROCKEFELLER et al.*

FEDERAL TRADE COMMISSION v. A.W. CLAUSEN et al.*

Nos. 76 Civ. 1826, 76 Civ. 1827. F.T.C. File No. 99-271.

(United States District Court, Southern District of New York, June 26, 1978)

In an FTC action seeking enforcement of investigative subpoenas, court deferred the question of undue burden to permit submission of "affidavits specifying the material objectionable, the alleged burden and any alternative method for obtaining from the banks the information required." After considering such submissions, court held that a presumption of good faith and primary control of its own proceeding was FTC's due, and production of documents pursuant to the guidelines and principles set forth in the Commission's Statement of Intent did not constitute an undue burden.

Enforcement was ordered accordingly.

Before LASKER, *District Judge.*

OPINION

In our opinion, 441 F.Supp. 234, upholding the validity of the subpoena which is the subject of this action, we specified that for reasons there stated disposition of the issue of burdensomeness of the subpoena would "be deferred for a limited period of time to allow submission of affidavits specifying the material objectionable, the alleged burden and any alternative method for obtaining from the banks the information required." The matter was thereafter referred to the Honorable Sol Schreiber, who conferred with the parties and on May 9, 1978, issued his recommendations together with a proposed order. The Magistrate made a major contribution to the subject by proposing a process of phased compliance. The parties have now placed their views before the court and each has submitted proposed orders.

Upon a study of the transcripts of hearings before Magistrate Schreiber and consideration of the views expressed in our earlier opinion, particularly 441 F. Supp. at 242, we believe the position of the Commission to be the sounder of those proposed and have today signed the order it suggested adding thereto a stay of ten days. We believe that, as the Commission argues, it is entitled to the presumption of good faith and the primary control of its own proceedings and that the Statement of Intent of the Commission attached to its

*Not reported in Federal Reporter. Reported in Trade Reg. Rep. ¶ 62,185 at 75,303 (1978-2 Trade Cases).

memorandum in opposition to the Magistrate's recommended order is such as to assure that a structure of phased compliance will be observed which will provide reasonable protection to the respondents in the circumstances.

ORDER

Petitioner, the Federal Trade Commission ("Commission"), has invoked the aid of the Court, pursuant to 15 U.S.C. § 49, in requiring respondents to comply with administrative subpoenas *duces tecum* issued by the Commission on June 10, 1975, in an investigation being conducted by the Commission, as such subpoenas were modified by the Commission's letters of August 21, 1975, March 2, 1976, and June 25, 1976 (hereinafter collectively referred to as the "subpoenas"). By its opinion of November 23, 1977, this Court held that the subpoenas are within the Commission's authority and are relevant to the Commission's inquiry, leaving only the issue of the alleged undue burdensomeness of the subpoenas to be resolved. Counsel for the Commission have now lodged with the Court a statement of intent (which statement is appended hereto and incorporated herein by reference) by which they have committed themselves to the principle of phased compliance, with full cooperation with opposing counsel at all stages in working to eliminate any unnecessary burdens and, to the extent consistent with investigational objectives, the fullest possible reduction of the scale of production for later compliance phases based upon information supplied in earlier phases.

Having considered the recommendation of the Magistrate, the papers of record and the various arguments advanced by the parties on the question of undue burden, and having determined that production pursuant to the principles and guidelines set forth in the Commission's Statement of Intent will not constitute an undue burden, it is hereby

Ordered that the Commission's subpoenas are enforced as follows:

(1) upon receipt of notice from the Commission, said notice not to be given until ten (10) days after entry of this order respondents shall produce materials responsive to the subpoenas in accordance with the principles and guidelines set forth in the Commission's statement of intent;

(2) in accordance with the Commission's prior commitment, respondents may (at their option) produce documents responsive to the subpoenas at respondents' premises, provided, however, that Commission staff is entitled to take possession of those documents selected by staff (or copies thereof made at respondents' expense).

(3) the effect of this order shall be stayed until July 6, 1978 at 5:00 P.M.

HEUBLEIN, INC. v. FEDERAL TRADE COMMISSION et al.*

Civ. A. No. 77-2026. F.T.C. File No. 99-384.

(United States District Court, District of Columbia, June 27, 1978)

1. AN *IN CAMERA* SEARCH FOR SEGREGABLE NONEXEMPT DATA SHOULD BE CONDUCTED ONLY WHERE RECORD IS VAGUE OR AGENCY'S EXEMPTION CLAIMS TOO SWEEPING OR SUGGESTIVE OF BAD FAITH.

   It is only where record is vague or agency claims of exemption under the Freedom of Information Act too sweeping or suggestive of bad faith that a district court should conduct an in camera examination to look for segregable nonexempt matter.

2. NO REASONABLE SEGREGABLE NONEXEMPT DATA OR LACK OF DILIGENCE IN FTC'S EFFORTS TO HONESTLY DESCRIBE CONTENTS OF WITHHELD MATERIAL WAS REVEALED BY *IN CAMERA* INSPECTION OF REPRESENTATIVE NUMBER OF DESIGNATED DOCUMENTS.

   In proceeding against the Federal Trade Commission wherein plaintiff corporation contested validity of grounds offered in support of Commission's withholding of certain documents requested by plaintiff under the Freedom of Information Act, in camera examination of representative number of designated documents disclosed that the FTC was diligent in its efforts to honestly describe contents of documents at issue and disclosed no reasonably segregable factual material to be disclosed.

3. GOVERNMENT MUST DEMONSTRATE THAT SOUGHT DISCLOSURES WILL INTERFERE WITH ITS PROCEEDINGS WHERE A RESPONDENT IN AN ONGOING ADMINISTRATIVE ENFORCEMENT ACTION SEEKS TO EMPLOY FOIA TO AUGMENT MATERIAL PRODUCED BY DISCOVERY.

   Where there is an ongoing administrative enforcement proceeding during which plaintiff is provided with opportunity to engage in discovery, plaintiff may not then use the Freedom of Information Act to augment material produced by discovery; in such case, government must demonstrate that proposed disclosure will interfere with an actual or concretely proposed enforcement proceeding.

4. SINCE DISCLOSURE WOULD INTERFERE WITH ONGOING FTC ENFORCEMENT PROCEEDING, FOIA'S INVESTIGATORY FILE EXEMPTION PROTECTED INFORMATION IN OPEN FILE FROM RESPONDENT THAT SOUGHT DATA FOLLOWING COMPLETION OF DISCOVERY.

   Information contained in open file against plaintiff corporation, which was requested by plaintiff after administrative complaint was filed against it by the Feder[53]al Trade Commission and after completion of discovery, and which would interfere with prosecution of ongoing administrative enforcement proceedings, was properly exempted from disclosure under the Freedom of Information Act under the investigatory files exemption.

*Reported in 457 F.Supp. 52 (1978).

5. AN ENTIRE DOCUMENT CANNOT BE WITHHELD SIMPLY BECAUSE IT CONTAINS A RECOMMENDATION, BUT WHERE SUBSTANTIAL FACTUAL INFORMATION HAD ALREADY BEEN RELEASED AND THE ONLY THING UNKNOWN TO PLAINTIFF WAS THE PARTICULAR THEORY ADVANCED OR ARGUMENT MADE, INTRAAGENCY MEMORANDA EXEMPTION WAS PROPERLY INVOKED.

Although mere fact that document contains a recommendation is not ground for withholding entire document from disclosure under the Freedom of Information Act, intraagency memoranda exemption was properly invoked where substantial factual information had already been released, plaintiff who requested information knew precise circumstances in which recommendations were made, and only thing that plaintiff did not know was particular theory advanced or argument made.

6. CERTAIN DOCUMENTS PROTECTED BY FOIA'S INVESTIGATORY FILES EXEMPTION WERE ALSO EXEMPT FROM DISCLOSURE UNDER INTRAAGENCY MEMORANDA EXEMPTION, AS WERE COMMISSION "BLUE MINUTES," AND REFERRAL SLIPS ASSIGNING CERTAIN MATTERS TO VARIOUS PARTS OF THE AGENCY FOR PRELIMINARY REVIEW.

"Blue minutes," referral slips in which certain matters were assigned to different parts of agency for preliminary review, and certain other documents found to be exempt under investigatory files exemption were exempt from disclosure under the Freedom of Information Act under intraagency memoranda exemption.

In proceeding against Federal Trade Commission, plaintiff corporation contested validity of grounds offered in support of Commission's withholding of certain documents requested by plaintiff under the Freedom of Information Act. On cross motions for summary judgment, the District Court, Flannery, J., held that: (1) in camera examination of representative number of designated documents disclosed that FTC was diligent in its efforts to honestly describe contents of documents at issue and disclosed no reasonably segregable factual material to be disclosed; (2) information contained in open file against plaintiff corporation, which was subject of an ongoing administrative trial and which did not request information until after completion of discovery, was properly exempted from disclosure, where such information would interfere with prosecution of ongoing administrative enforcement proceedings, and (3) "blue minutes," referral slips in which certain matters were assigned to different parts of agency for preliminary review, and certain other documents found to be exempt under investigatory files exemption were exempt from disclosure under the Freedom of Information Act under intraagency memoranda exemption.

Plaintiff's motion for summary judgment denied; defendants' motion for summary judgment granted.

(Syllabus, with substituted captions, taken from 457 F.Supp. 52)

J. Wallace Adair, Ralph J. Savarese, John P. Wintrol, Raymond A. Jacobsen, Jr., Howrey & Simon, Washington, D.C., for plaintiff; *George J. Caspar,* Gen. Counsel, Heublein Corp., Farmington, Conn., of counsel.

Daniel J. Metcalf, Kay E. Kiner, FTC, Washington, D.C., *John Oliver Birch,* Asst. U.S. Atty., Civil Division, Washington, D.C., for defendants.

ORDER

FLANNERY, *District Judge.*

This matter comes before the court on cross-motions for summary judgment. The essential facts are not in dispute. It appears that plaintiff in the late 1960's attempted to effect a merger with United Vintners. This merger attracted the attention of the F.T.C. due to the possible adverse effects on competition in the wine and distilling industry. The F.T.C. conducted preliminary and formal investigations into this matter. These investigations culminated in the filing of an administrative complaint against plaintiff in 1972. After a period during which the parties attempted to settle the antitrust case, the F.T.C. issued an amended complaint on November 16, 1976. Discovery was completed in the administrative matter on March 28, 1977, and the administrative trial began in San Francisco on December 13, 1977. Although the F.T.C. possesses an extensive discovery procedure, plaintiff never requested the documents at issue during discovery. Rather, on July 29, 1977, plaintiff filed an F.O.I.A. request for all documents held by defendants in the *National Distillers and Chemical Corp.* file, an enforcement file closed on October 25, 1972. Also, on August 5, 1977, plaintiff requested all information in the open enforcement file against plaintiff and in the closed National Distillers file which had been prepared by Edna Knopp, the Commission economist. During the processing of these requests, and the subsequent administrative appeals, a majority of the documents responsive to the requests were released. *See* Index to Documents, p. 2 (70-75% of the documents found to be responsive were released.) It appears that a large number of the documents in the National Distillers file had been destroyed in the six years since that file was closed. *See* Affidavits of John D. Macoll (Defendant's Exhibit D) and Robert J. Gac (Defendant's Exhibit E). It does not appear that plaintiff doubts the thoroughness of defendant's documents search, but merely contests the validity of the grounds offered in support of the withholding of certain documents.

Defendants have indicated that the only documents found to be responsive to plaintiff's request were in the open Heublein file. Defendants have submitted an extensive indexing and justification statement for those documents withheld in whole or in [54] part. The various documents have been subdivided into categories according to their content. It should be noted that Document 1 in Category G(2), for which exemption 6 is claimed, and all of the documents in Category J, for which exemption 4 is claimed, are no longer at issue, the plaintiff having conceded the validity of those withholdings. As

to the remainder of the documents, defendant claims exemption 5 (intraagency memoranda), exemption 7(A) (investigatory files), or both.

I. *Exemption 7(A)*

5 U.S.C. § 552(b)(7) provides in pertinent part that the mandatory disclosure provisions of the Freedom of Information Act do not apply to:

> investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings . . .

In the present case, the file on Heublein, from which all of the responsive documents still in issue were taken, is currently open and the subject of an ongoing adminstrative trial in which the F.T.C. seeks enforcement of federal antitrust laws. It is clear that until March of 1977, plaintiff had the right to engage in discovery in anticipation of this administrative hearing under the supervision of the administrative law judge. It is also clear that plaintiff did not avail itself of this opportunity to get the documents now at issue. Defendants contend that because the documents at issue were in this open file, these documents, if disclosed, would severely inhibit the F.T.C.'s enforcement litigation. It appears that the key to the F.T.C.'s case in the enforcement action rests on an analysis of a market definition developed by Edna Knopp, the Commission economist. Most of the documents at issue reflect either information she collected or considerations she made in developing this market model. Also, some of the documents, specifically those developed in relation to the National Distillers case but located in the Heublein file, are said to so mirror the F.T.C.'s tactics in the present enforcement action that releasing them would be extremely prejudicial. Plaintiff argues that some of these documents were not generated specifically by the investigation, and, therefore, do not fall under exemption 7(A). Plaintiff also alleges that defendant's descriptions of these documents are self-serving and deceiving and that, therefore, this court should engage in an *in camera* inspection of the more than 900 pages of documents still remaining.

[1] As for the request for *in camera* inspection, the Circuit Court in *Weissman v. C.I.A.*, 184 U.S.App.D.C. 117, 565 F.2d 692 (1977) has stated that it would be a "staggering burden" to require a court to engage in an *in camera* inspection of documents in every case. *Id.* 184 U.S.App.D.C. at 122, 565 F.2d at 697 n. 11. Rather,

> It is only where the record is vague or the agency claims too sweeping or suggestive of bad faith that a District Court should conduct an *in camera* examination to look for segregable non-exempt matter.

Id. 184 U.S.App.D.C. at 123, 565 F.2d at 698. At oral argument, counsel for plaintiff raised questions as to the thoroughness of the F.T.C.'s efforts to disclose all reasonably segregable factual material. Despite the fact that the F.T.C. had already released a large amount of non-exempt factual material in this case, the court on May 8, 1978, ordered the F.T.C. to submit a small but representative number of designated documents for *in camera* inspection. In this way, the court was able to "spot check" the reliability of the F.T.C.'s document index and the F.T.C.'s efforts to segregate factual material. *See Ash Grove Cement* v. *F.T.C.*, 167 U.S.App.D.C. 249, 511 F.2d 815 (1975). In this way, the court has avoided the burden of a full *in camera* review.

[2] Upon examination of the documents requested, the court is satisfied that the F.T.C. has been diligent in its efforts to honestly describe the contents of the documents at issue. The documents matched closely the descriptions ascribed to them in the index. Further, the court found no reasonably segregable factual material to be disclosed. Although any economic anal[55]ysis must, of course, rely on facts, the facts contained in the documents examined were stated in such a way as to be inextricably intertwined with the analysis which the F.T.C. claims is exempt. Since the examination of this sampling of documents has failed to unearth any of the abuses alleged by plaintiff, this court will proceed to consideration of the merits of these motions without the further need for *in camera* review.

[3,4] As for the merits of defendants' exemption 7(A) claim, it is clear that where there is an ongoing administrative enforcement proceeding during which plaintiff had been provided with an opportunity to engage in discovery, plaintiff may not then use the FOIA to augment the material produced by discovery. *ITT Continental Baking Co.* v. *F.T.C.*, 1976-2 Trade Cases [C.C.H.] ¶ 60,968 (D.D.C.1976); *Gifford-Hill & Co., Inc.* v. *F.T.C.*, 1975-2 Trade Cases [C.C.H.] ¶ 60,674 (D.D.C.1976). In such a case, the government must demonstrate that the proposed disclosure will interfere with an actual or concretely proposed enforcement proceeding. *Gifford-Hill, supra*, at 67,945. Indeed, in *Gifford-Hill*, this court stated:

> To grant the plaintiff earlier access [to the information at issue] under FOIA would undermine the Commission's obviously fair discovery process, and to allow a private litigant, who is the object of a complaint before the Commission, to gain adversary advantage by means of this action simply would not fulfill the interests of informing the public contemplated by the Act.

Id. It is clear, therefore, that the information contained in the open file which would interfere with the prosecution of the administrative enforcement proceeding was properly exempted from disclosure. As

such, the following documents were properly exempted: Category A(I) 1, 2, 4; Category A(II) 2-24; Category B 1-4; Category C 1-12; Category D 1-9; Category E 1-3; and Category F 1-3.

It should be noted that the F.T.C. claims exemption 5 for all of the documents listed above. Also, the F.T.C. claims exemption 7(A) for documents A(I) 3, A(II) 1, G(1) 1-3, G(2) 2-4, and Categories H and I. However, these documents do not relate to the Heublein investigation except in that they reveal the theories the F.T.C. proposes to use in Heublein. It is arguable whether these documents fall within the 7(A) exemption since they are not related to an open investigation. However, the court need not reach this question since, as will be shown below, all of these documents are exempted by Exemption 5.

II. *Exemption 5.*

[5, 6] Plaintiff also claims that since these documents are intraagency memoranda, they are exempt from disclosure under Exemption 5. The Supreme Court in *N. L. R. B.* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 95 S.Ct. 1504, 44 L.Ed.2d 29 (1975) indicated that Congress intended that Exemption 5 should shield governmental decisionmaking from the type of intrusive inspection which would prevent the deliberative process from operating effectively. *Id.* 95 S.Ct. at 1516-17. At the same time, exemption 5 could not be used to hide final agency action from public view since this would result in the promulgation of "secret law." *Id.* 95 S.Ct. at 1518. Although it is true that the mere fact that a document contains a recommendation is not grounds for withholding the entire document, *Bodner* v. *F.T.C.*, 1975-1 Trade Cases [C.C.H.] ¶ 60,118 at p. 56,269, *see EPA* v. *Mink*, 410 U.S. 73, 93 S.Ct. 827, 836, 35 L.Ed.2d 119 (1973), in this case, substantial factual information has already been released. Indeed, plaintiff knows the precise circumstances in which these recommendations were being made. All that plaintiff does not know is the particular theory advanced or argument made. Under such circumstances, and in reliance on the detailed *Vaughn* statement submitted by the F.T.C., the court is of the opinion that exemption 5 has been properly invoked. Documents A(I) 3, A(II) 1, and all of the documents in Category H are F.T.C. "Blue Minutes" which were specifically exempted under exemption 5 in *Ash Grove* **[56]** *Cement Co.* v. *F.T.C.*, 167 U.S.App.D.C. 249, 511 F.2d 815, 816 (1975). The documents in Category I are referral slips in which certain matters are assigned to different parts of the agency for preliminary review. Documents of this type were held to be exempt from disclosure in *Grolier* v. *F.T.C.*, No. 76-1559, at 6 (D.D.C., March 22, 1978). In addition, all of the documents previously held to be exempt under exemption 7(A) are also exempt under exemption 5.

For these reasons, and upon review of the cross-motions for summary judgment, the memoranda submitted in support thereof and in opposition thereto, oral argument thereon, the documents submitted to the court for *in camera* inspection, and the entire record now before the court, it is, by this court, this 27th day of June, 1978,

ORDERED, ADJUDGED and DECREED that plaintiff's motion for summary judgment be, and the same hereby is, denied; and it is further

ORDERED, ADJUDGED and DECREED that defendants' motion for summary judgment be, and the same hereby is, granted; and it is further

ORDERED, ADJUDGED and DECREED that judgment be, and the same hereby is, entered in favor of defendants.

AMOLSCH & MADDEN, INC. d/b/a FTC:WATCH
v.
FEDERAL TRADE COMMISSION et al.*

Civ. A. No. 77-1553. F.T.C. File No. 99-375.

(United States District Court, District of Columbia, June 30, 1978)

In denying plaintiff's motion for summary judgment in an FOIA action to compel disclosure of a compliance report incorporated into an FTC consent order against a vocational school, court held that since the document would be used in a future adjudication to determine refund eligibility of former students, it warranted the FOIA protection accorded documents whose production would interfere with prospective law enforcement proceedings.

Before SMITH, *District Judge.*

OPINION

Plaintiff brought this action under the Freedom of Information Act (hereinafter "Act"), 5 U.S.C. § 522, to compel disclosure of one document, a compliance report, incorporated in a consent order, which delineates those former students to whom the vocational school subject to that order must pay tuition refunds. Defendants have invoked the seventh exemption of the Act, 5 U.S.C. § 552(b)(7), contending that the document is an investigatory document, release of which would interfere with enforcement proceedings. This case is before the Court on Cross-motions for Summary Judgment.

In June, 1971, the government commenced an investigation into a Ryder subsidiary, Ryder Schools, which offered vocational training to would-be truck drivers and heavy equipment operators. The investigation concerned the truthfulness of representations by Ryder Schools concerning the prospects for placement of its graduates in jobs for which they were to be trained.

After investigation and prior to the issuance of a formal adjudicative complaint by the Commission, Ryder tentatively agreed to an outline of the settlement that would provide partial refunds to former students, up to the total redress amount of $1.5 million. During the negotiations it became evident that standards would be useful in determining which former students would be eligible for restitution. Such standards were negotiated, but Ryder and the Federal Trade Commission (hereinafter "FTC") staff felt that these standards should be kept confidential until questionnaires being sent

*Not otherwise reported.

to former students were returned so that students who were aware of the standards could not tailor their responses to ensure that they would receive a refund.

To provide this confidentiality, the supervising government attorney suggested that instead of placing the standards in the agreement itself, they be embodied in a compliance report, which under the Commission's Rules of Practice, 16 CFR § 2.33, may be accorded confidential treatment for the Report. The FTC provisionally accepted the consent agreement on or about January 18, 1977. The consent agreement was placed on the public record for comment for 60 days. After reviewing the consent agreement in light of the comments received, the Commission gave final approval to the agreement on December 28, 1977.

Plaintiff filed a Freedom of Information Act request for the withheld initial compliance report. The request was denied, and an appeal to the Commission resulted in a similar denial. As ground for its denial, the FTC relied on the exemption contained in Section 552(b)(7)(A) of the Act relating to investigatory records compiled for law enforcement purposes, production of which would interfere with enforcement proceedings.

The present action followed. Here plaintiff contends that the compliance report is part of the order and must be disclosed; that the compliance report is not "investigatory"; and that it would not interfere with enforcement proceedings.

An agency, seeking the protective shelter of a statutory exemption to justify its refusal to disclose records, has the burden of proving that the document involved falls within the exemption. *Getman v. NLRB*, 450 F.2d 670, 673-674 (D.C. Cir. 1971). The Freedom of Information Act reflects a public policy of favoring citizen access to government records. "The legislative plan creates a liberal disclosure requirement, limited only by specific exemptions which are to be narrowly construed." *Bristol-Myers Co. v. FTC*, 424 F.2d 935, 938 (D.C. Cir.) *cert. denied*, 400 U.S. 824 (1970). *Accord, Ditlow v. Shultz*, 517 F.2d 166, 169 (D.C. Cir. 1975); *German v. NLRB*, 450 F.2d 1067 (D.C. Cir. 1971).

Plaintiffs contend that defendants have not carried this burden, citing *United States v. Trucking Employers, Inc.*, 39 Ad.L.2d (P&F) 694 (D.D.C. 1976), for the proposition that compliance reports do not qualify as "investigatory records". In that case, Chief Judge Bryant of this Court stated:

> Finally, the companies argue that exemption (b)(7) applies here, in that the material constitutes investigatory files compiled for law enforcement purposes. The leading cases in this circuit make clear that these files cannot be characterized as either investigatory or compiled for law enforcement purposes, since they are *subsequent* to an adjudication and are used solely to monitor compliance with the consent decree in this case, not to evaluate compliance with federal law with a possible statutory enforcement action resulting. *Id* at 698 (emphasis in original).

The rules of the FTC provide for two types of documents that are "compliance reports." The compliance report at issue here is an initial report, defined at 16 CFR § 2.33 as "setting forth in precise detail the manner in which the respondent *will* comply with the order *when and if* entered". (emphasis added). The more traditional form of compliance report indicates how the respondent has complied with an order and is found under the section relating to adjudications, 16 CFR § 3.61. It is this second type of FTC compliance report which is involved in the *Trucking Employers* case.

The difference between this case and *Trucking Employers* is the difference between the past and the future. In *Trucking Employers* the compliance reports followed and related to a completed adjudication. In the instant action, the compliance report reflects the results of a lengthy FTC investigation of hiring practices in trucking and heavy equipment operation, and looks to a future adjudication of refund claims to be submitted by Ryder graduates.

This adjudicatory process consists of several steps. On June 14, 1978 Ryder's independent contractor mailed the affidavit questionnaires to certain Ryder graduates, pursuant to Paragraph 4 of Part III of the order. The completed questionnaires and clarifying information will be returned by November 6, 1978, pursuant to Paragraph 10(e) of Part III of the order. Then the refund claims will be adjudicated by the FTC and Ryder, and in the event of disagreement, by abritrators pursuant to the rules of the American Arbitration Association. The compliance report will be used in this adjudicatory process to determine refund eligibility.

Since the publication of the compliance report at this time would interfere with prospective law enforcement proceedings, this case is clearly different from *Trucking Employers.* It is evident the compliance report in question should be given (b)(7)(A) protection for the limited period of time requested. The compliance report in this case will be made public on November 7, 1978, one day after the November 6 deadline for the submission of the affidavit questionnaires and clarifying information.

Accordingly, defendant's motion for summary judgment is granted and plaintiff's motion for summary judgment is denied.

ORDER

Upon consideration of the motions for summary judgment filed by plaintiff and defendants, the points and authorities in support thereof and in opposition thereto, and after oral argument by counsel, it is by the Court this 30th day of June, 1978

ORDERED that defendants' motion for summary judgment is granted and plaintiff's motion for summary judgment is denied.

STANDARD OIL COMPANY OF CALIFORNIA v. FEDERAL TRADE COMMISSION*

No. 75—1341. F.T.C. Docket No. 8827.

BATTEN, BARTON, DURSTINE & OSBORN, INC. v. FEDERAL TRADE COMMISSION

No. 75—1342. F.T.C. Docket No. 8827.

(United States Court of Appeals, Ninth Circuit, July 3, 1978)

1. THAT VIEWING PUBLIC WILL PLACE AN ABSURD INTERPRETATION OF AN ADVERTISEMENT SHOULD NOT BE PRESUMED BY EITHER COURT OR FTC

[654] Although the Federal Trade Commission Act is intended to protect "that vast multitude which includes the ignorant, the unthinking and the credulous," neither the courts nor the Federal Trade Commission should freely speculate that the viewing public will place a patently absurd interpretation on an advertisement.

2. ALTHOUGH FIRST AMENDMENT PROTECTS COMMERCIAL SPEECH, WHEN DISCUSSION OF A MATTER OF PUBLIC CONCERN BECOMES A VEHICLE FOR THE SALE OF A PRODUCT, INCREASED IMPORTANCE MAY BE ACCORDED PRODUCT CLAIMS, AND FTC, IN EVALUATING THE ADVERTISEMENT, MAY APPROPRIATELY CONSIDER THIS FACTOR.

Although the area of commercial speech is not exempt from First Amendment protection, when discussion of a matter of public concern becomes a vehicle for the sale of a product, the representations which bear on the characteristics of the product may take on increased importance in the mind of the public, and it is appropriate for the Federal Trade Commission to consider this factor in determining whether the advertising is misleading or deceptive.

3. FTC FINDING THAT THREE TELEVISION COMMERCIALS WERE MISLEADING AS TO THE DEGREE THAT PROMOTED GASOLINE ADDITIVE REDUCED AIR POLLUTANTS WAS SUPPORTED BY EVIDENCE.

Evidence supported Federal Trade Commission's conclusion that three television commercials promoting a gasoline additive were "misleading" as to degree of reduction in auto emissions and the effect of that reduction on air pollution resulting from use of the additive.

4. IN DETERMINING ACCURACY OF EXPRESS OR IMPLIED REPRESENTATIONS IN ADVERTISEMENTS, ADVERTISING AGENCY'S STANDARD OF CARE INCREASES IN DIRECT RELATION TO DEGREE OF ITS ACTIVE PARTICIPATION IN THE DEVELOPMENT OF THE COMMERCIAL PROJECT.

Standard of care to be exercised by an advertising agency in determining what express and implied representations are contained in an ad and in assessing the truth or falsity of those representations increases in direct relation to the advertising agency's participation in the commercial project; degree of its participation is measured by a number of factors including the agency's role in

*Reported in 577 F.2d 653 (1978). For case before the Commission, see 84 F.T.C. 1401.

writing and editing the text of the ad, its work in creating and designing graphic or audiovisual materials, its research and analysis of public opinions and attitudes, and its selection of the appropriate audience for the advertising message.

5. EVIDENCE AMPLY SUPPORTED FTC'S FINDING THAT ADVERTISING AGENCY KNEW OR SHOULD HAVE KNOWN THAT ADVERTISEMENTS WERE MISLEADING, GIVEN THE DEGREE OF ITS PARTICIPATION IN THEIR DEVELOPMENT.

Evidence was adequate to support Federal Trade Commission's findings that, given the degree of participation by advertising agency in development of television commercials promoting a gasoline additive, it knew or should have known that the ads were misleading as to the degree of reduction in auto emissions and the effect of that reduction on air pollution resulting from use of the additive.

6. FTC'S DISCRETION TO FORMULATE CEASE AND DESIST ORDERS HAS LIMITATIONS.

Although the Federal Trade Commission is allowed wide latitude in structuring its remedies based on its expertise in determining what is necessary to eliminate unfair practices and its administrative responsibility to devise remedies according to a consistent statutory policy, the Commission's discretion to formulate cease and desist orders is not unlimited.

7. WHETHER RESPONDENTS HAD ACTED IN BLATANT DISREGARD OF THE LAW AND WHETHER THEY HAD A HISTORY OF ENGAGING IN UNFAIR TRADE PRACTICES ARE FACTORS FOR CONSIDERATION IN EVALUATING THE RELATION BETWEEN FTC'S ORDER AND THE UNLAWFUL PRACTICE.

Among the circumstances which should be considered in evaluating the relation between a Federal Trade Commission cease and desist order and the unlawful practice are whether the respondents acted in blatant and utter disregard of the law, and whether they had a history of engaging in unfair trade practices.

8. RESTRAINT IN FORMULATING REMEDIAL ORDERS WHICH MAY CONSTITUTE A PRIOR RESTRAINT ON PROTECTED COMMERCIAL SPEECH IS DICTATED BY FIRST AMENDMENT CONSIDERATIONS.

First Amendment considerations dictate that the Federal Trade Commission exercise restraint in formulating remedial orders which may amount to a prior restraint on protected commercial speech.

9. PURSUING RIGOROUS ENFORCEMENT TO THE EXTENT OF DISCOURAGING ADVERTISING WITH NO CONCOMITANT MEANS IN ASSURING ACCURACY AND TRUTHFULNESS IS IMPROPER.

Administrative agencies may not pursue rigorous enforcement to the extent of discouraging advertising with no concomitant means in assuring accuracy and truthfulness.

10. FTC'S BLANKET ORDER ENJOINING RESPONDENTS FROM ALL ADVERTISING FOR "ANY" PRODUCT WHICH CREATES A MISLEADING IMPRESSION WAS UNWARRANTED WHERE PUBLICATION OF THE THREE CITED ADVERTISEMENTS WAS NOT A BLATANT DISREGARD OF THE LAW AND RESPONDENTS HAD NO HISTORY OF ENGAGING IN UNFAIR TRADE PRACTICES.

Where oil company and advertising agency did not act in blatant disregard of the law and company and agency did not have history of engaging in unfair trade practices, Federal Trade Commission blanket cease and desist order enjoining company and agency from all advertising which creates a misleading

impression by use of tests or demonstration or by visual means generally related to "any" product, based on a finding concerning three misleading television advertisements, was unwarranted.

Oil company and its advertising agency challenged a decision and a cease and desist order issued by the Federal Trade Commission. Commission found that oil company and agency had broadcast advertising that was false, misleading, and deceptive, in violation of the Federal Trade Commission Act. The Court of Appeals, Kennedy, *Circuit Judge*, held that: (1) evidence supported Commission's conclusion that three television commercials promoting a gasoline additive were "misleading" as to the degree of reduction in auto emissions and the effect of that reduction on air pollution resulting from use of the additive; (2) evidence was adequate to support Commission's finding that, given the degree of participation by the advertising agency, it knew or should have known that the gasoline additive ads were misleading in the respects indicated and (3) blanket cease and desist order enjoining company and agency from all ads which create a misleading impression by use of tests or demonstrations or by visual means related to "any" product was unwarranted.

Affirmed as modified.

(Syllabus, with substituted captions, taken from 577 F.2d 653)

Francis R. Kirkham (argued), San Francisco, Cal., *Lawrence G. Meyer* (argued), Washington, D.C., for petitioners.

David M. Fitzgerald (argued), Washington, D.C., for respondent.

Before CUMMINGS,† HUFSTEDLER, and KENNEDY, *Circuit Judges.*

KENNEDY, *Circuit Judge:*

In this consolidated appeal, petitioners Standard Oil Company of California (Standard), and Batten, Barton, Durstine & Osborn, Inc. (BBD&O), challenge a decision and a cease and desist order issued by the Federal Trade Commission (FTC or Commission). The Commission found that Standard and BBD&O had broadcast advertising that was false, misleading, and deceptive, in violation of section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. Standard and BBD&O contend that the advertising was accurate and in all respects lawful. They further state that even if the advertising were improper, the cease and desist order issued by the FTC is overly broad. We affirm the Commission's finding that the advertising violated section 5 of the Act, but we agree that the cease and desist order is unwarranted and therefore direct that the scope of the order be modified.

The case concerns three television commercials that promoted a gasoline additive known as F-310. The commercials were broadcast on television from January 9 to June 9, 1970. Two commercials were

†Honorable Walter J. Cummings, Senior Circuit Judge of the Seventh Circuit, sitting by designation.

based on demonstrations which were designed to afford viewers a visual comparison of automobile exhaust before and after using F-310. See Appendix I.†† In one, a large clear balloon was attached to the exhaust pipe of an idling automobile. The balloon was shown inflating with black, opaque vapor, while the announcer described it as "filling with dirty exhaust emissions that go into the air and waste mileage." The announcer then stated that "Standard Oil of California has accomplished the development of a remarkable gasoline additive, Formula F-310, that reduces exhaust emissions from dirty engines." He informed the viewer that the same car was run on six tankfuls of Chevron F-310 and the result was "no dirty smoke, cleaner air." To prove the point, a clear balloon was again shown being attached to the car. This time the balloon inflated with transparent vapor. In conclusion the television viewer was told: "Chevron with F-310 turns dirty smoke into good, clean mileage. There isn't a car on the road that shouldn't be using it."

The second commercial known as the bag demonstration, was similar to the commercial just described except that the automobile was completely enclosed in a transparent bag. In the before segment of the demonstration, the automobile was hidden from view by black exhaust smoke. In the after segment the automobile was plainly visible, thus illustrating the effects of using the F-310 additive.

The third commercial considered by the Commission focused on a meter dial labeled "exhaust emissions." The dial showed a scale from 0 to 100. The word "clean" labeled the 0 extremity, and the word "dirty" was printed under 100. Once again a before-and-after format was used, with the meter pointing to 100 before use of F-310 and to 20 afterwards. The announcer's accompanying message was: "[A]fter just six tankfuls of Chevron F-310—exhaust emissions reduced." The commercial again closed with the message that: "There isn't a car on the road that shouldn't be using it."

On May 19, 1970 the FTC advised Standard that it objected to the advertisements because it was not clear that the car depicted in the before segment of each commercial had been driven previously with a gasoline that was deliberately formulated to accelerate carbon deposits, resulting in an especially dirty engine. The FTC expressed concern that the commercials did not indicate either that the degree of improvement in gasoline mileage and pollution reduction would vary according to the condition of the engine, or that the gasoline used to compare the test cars for the before part of the sequence caused much dirtier engines than would have been caused by normal gasoline.

††Not reproduced herein.

Standard submitted an assurance of voluntary compliance to the Commission on May 25, 1970. Beginning June 10 the commercials were altered by superimposing on the film phrases such as, "Very Dirty Engine Purposely Used to Provide Severe Test," and "Degree of Improvement in Your Car Depends on Condition of Engine."

On December 29, 1970 the Commission filed a complaint against Standard and BBD&O based on the commercials as they were presented prior to June 10, 1970, specifying eleven charges of false advertising. The charges were sweeping. The FTC alleged not only that the ads were misleading in the respects indicated above, but also that F-310 did not reduce pollution to any significant degree.[1] After extended hearings, the administrative law judge found that F-310 was effective as claimed, and that it did result in a significant reduction in exhaust emissions. He further found that the commercials accurately depicted the product's performance. Accordingly he recommended that the administrative complaint be dismissed in its entirety.

The Commission adopted substantially all of the findings of the administrative law judge pertaining to the efficacy of the product. The FTC's charges that the product did not reduce pollution were found to be wholly without merit. The Commission agreed they should be dismissed and stated that the development of F-310 was "laudable."

The Commission did not, however, adopt the findings of the administrative law judge as to certain of the alleged disparities between the claims which the commercials were interpreted to make and the data offered to substantiate those claims. Specifically, the Commission found that the commercials falsely represented (1) that use of F-310 would result in a complete reduction of air pollutants; (2) that all cars would show the same degree of improvement as was illustrated by the reduction of pollution in the exceptionally dirty engine; (3) that the use of F-310 would affect all types of exhaust

[1] As summarized by the Commission, the complaint alleged that the advertisements contained the following misleading and deceptive representations:

(1) F-310 in Chevron gasoline is a revolutionary development in the reduction of air pollution; (2) Chevron with F-310 will produce motor vehicle exhaust which is generally pollution free; (3) Chevron with F-310 will significantly reduce the total amount of air pollution; (4) Chevron with F-310 will significantly reduce air pollution caused by motor vehicles; (5) Chevron with F-310 will significantly reduce emissions of carbon monoxide (CO) and unburned hydrocarbons (HC) from every motor vehicle in which it is used; (6) the Balloon and Bag demonstrations constitute proof, or accurately or visually demonstrate that Chevron with F-310 reduces motor vehicle emissions of HC and CO and significantly reduces air pollution caused by motor vehicles; (7) every motor vehicle will emit black exhaust as pictured in the Balloon, Bag and other demonstrations if operated on motor fuels other than Chevron with F-310; (8) the building identified as Standard Oil Company of California Research Center in some of the advertisements is owned, occupied, or used for research by Standard; (9) the machine (Meter) pictured in some of the advertisements is used by the Federal Government to measure the total amount of pollution emitted by a motor vehicle; (10) tests or demonstrations had been performed before publication or dissemination of the advertisements which proved representations (2), (3), (4) and (5) above, and also that every purchase of Chevron with F-310 will obtain significantly better mileage than with any other commercially available gasoline; (11) F-310 or Chevron with F-310 will clean or keep clean all engines and engine components.

Record, vol. V, at 3465-66.

emissions; and (4) that the meter used in the third commercial portrayed an eighty percent reduction of pollution with F-310. Based on these findings the Commission held that Standard and BBD&O had violated section 5 and issued broad cease and desist orders against them.

Before turning to an analysis of the cease and desist orders and a determination of their propriety, we examine the petitioners' contention that there is no substantial evidence in the administrative record to support the Commission's finding that the commercials were misleading and deceptive, and BBD&O's additional contention that there is no support for the finding that it knew or should have known that the three advertisements were deceptive. The court has jurisdiction over this appeal under section 5(c) of the FTC Act, 15 U.S.C. § 45(c).

The Commission's Findings

[1] Although the law is intended to protect "that vast multitude which includes the ignorant, the unthinking and the credulous," *Aronberg* v. *FTC*, 132 F.2d 165, 167 (7th Cir. 1942), neither the courts nor the Commission should freely speculate that the viewing public will place a patently absurd interpretation on an advertisement. On the facts before it, the Commission could not properly have found that these ads claimed that F-310 removed all harmful chemical emissions from automobile exhaust. We do not think that any television viewer would have a level of credulity so primitive that he could expect to breathe fresh air if he stuck his head into a bag inflated by exhaust, no matter how clean it looked. If that were the whole case, we would agree with the petitioners and overturn the Commission's order in its entirety. But the Commission's opinion made a different point. The Commission was concerned with the ads' implicit statements about the degree of reduction in auto emissions and the effect of that reduction on the pollution problem.

Exhaust emissions are of two types: visible and transparent. The visible elements (black smoke and particulate matter) contribute less to pollution than the transparent elements. The Commission determined that the public is not aware of this fact. In support of this finding, it cited a study made by BBD&O with respect to the very commercials in question here. BBD&O, in reporting on this study to Standard, concluded from a survey it had made that only fourteen percent of motorists are aware that most polluting elements in automobile exhaust are invisible.[2]

[2] BBD&O reached this conclusion on the basis of answers received from motorists who were asked the following question:

> Sometimes a car, idling at a stoplight, gives off black smoke that you can see. Do you believe this is contributing more to air pollution than other cars?

Eighty-three percent of the motorists interviewed answered yes, and fourteen percent said no. BBD&O now interprets these responses as indicating that most people correctly believe that there is a relationship between black smoke and the degree of hydrocarbon and carbon monoxide emissions present in exhaust. Brief for Appellant BBD&O at 29. While this interpretation of the survey is certainly a reasonable one, we think that the Commission was entitled to take into consideration the inferences drawn by BBD&O at the time the survey was taken.

Hydrocarbons and carbon monoxide, two common exhaust pollutants which generally are transparent, were reduced by fifty percent and thirty-three percent, respectively, after use of F-310 in tests run on cars with very dirty engines. The additive had no effect at all on lead compound auto emissions which are also prime contributors to air pollution. The ads gave the public no indication whatsoever of the degree of reduction of invisible pollutants with use of F-310. Moreover, since the public, at least before it analyzes the question fully, is unaware that the visible pollutants eliminated by F-310 are not the most troublesome part of exhaust pollution, the complete disappearance of black smoke may indicate a greater pollution reduction than is actually achieved by the product. References in the ads to "no dirty smoke, cleaner air" and "turns dirty smoke into good, clean mileage" reinforced that erroneous impression.

We would be less confident in upholding the Commission's finding of a section 5 violation were there not other, more palpable, misrepresentations besides the overall misleading impression as to F-310's impact on the problem of air pollution. But there were other misrepresentations, and these lend support to the Commission's conclusion that the advertising had a capacity and tendency to mislead.

The Commission found that a substantial portion of the viewing audience would believe that the automobiles in all three advertisements were representative of most automobiles, and petitioners do not cite evidence in the record to contradict that conclusion. That representation, clear and implicit in the ads, simply was not true. Heavy engine deposits were built up in the test vehicles by use of a special, extra-dirty fuel to show a more dramatic difference between the before-and-after sequences. It is conceded that only a small percentage of cars on the road would have similar engine conditions before using F-310. Thus most cars, although they would be cleaned by the detergent effects of F-310, would not show as large an improvement as was demonstrated by the ad. The statement made in each advertisement that "[t]here isn't a car on the road that shouldn't be using it" seemed to promise similar results for all cars, thus reinforcing the misleading impression that the condition of the demonstration vehicle was representative of the condition of most automobiles. There is adequate evidence, therefore, to support the Commission's finding that the balloon and bag ads misrepresented the effect of F-310 on most automobiles. That misrepresentation provides an independent basis for the Commission's order, and it further suggests the capacity for the ads to misrepresent the efficacy of F-310 in reducing pollution generally.

Finally, the Commission conclusion that the meter advertisement was misleading. The ad showed a change of 80 units on a dial of 100

units after use of F-310. It is undisputed that the meter was a Beekman Infra-red Analyzer used by federal and state authorities to measure exhaust emissions. That instrument measures the level of hydrocarbon emissions. By reference to this measurement, one also can draw an inference as to the degree of reduction of carbon monoxide emissions, since the two pollutants generally come from the same source. It is undisputed that the meter was not rigged. The Commission's finding that it conveyed a misleading impression as used in the ad was based on the total absence of any explanation of the calibration shown on the meter dial. The drop from 100 units ("dirty") to 20 units ("clean") did not correspond to a percentage reduction or, indeed, to any other scale of measurement with which the public is familiar. As we have previously stated, the hydrocarbon reduction was fifty percent, not eighty percent. Equally important, the ad gave no indication at all that some emission pollutants not measured by the meter were wholly unaffected by F-310. These considerations support the Commission's determination that the meter ad violated section 5.

The issue before us as to each of the ads is whether the record supports the Commission's interpretation of the meaning the commercial would have to the average viewer, and the Commission's determination of the accuracy of that message.

[2] The Commission found that the public is acutely aware of the air pollution problem and that it is a matter of public importance for advertisements which play upon this concern to be accurate and precise. Implicit in the Commission's opinion is a finding that commercial messages might lead the average viewer, in his anxiety to help solve the pollution problem, to overreact even though upon careful reflection he might see for himself the limitations inherent in the advertiser's claim. Since it is now clear that the area of commercial speech is not exempt from first amendment protection, *Bates* v. *State Bar of Arizona*, 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977); *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976), comment on a subject of public interest must not be stifled even when it is presented in an advertising format. However, when discussion of a matter of public concern becomes a vehicle for sale of a product, the representations which bear on the characteristics of the product may take on increased importance in the mind of the public, and it is appropriate for the Commission to consider this factor in determining whether the advertising is misleading or deceptive.

[3]Here the Commission found that the predominant visual message was misleading, and that it was not corrected or con-

tradicted by the accompanying verbal message in the advertisements. "[T]he Commission may determine for itself [the deceptive nature of the representations] through visual inspection and analysis." *United States Retail Credit Ass'n* v. *FTC*, 300 F.2d 212, 217 (4th Cir. 1962); *Carter Products, Inc.* v. *FTC*, 268 F.2d 461, 495 (9th Cir.), *cert. denied*, 361 U.S. 884, 80 S.Ct. 155, 4 L.Ed.2d 120 (1959). In making this determination the Commission is entitled to "draw upon its own experience in order to determine (even) in the absence of consumer testimony, the natural and probable result of the use of advertising expressions." *Carter Products, Inc.*, 268 F.2d at 495 (parenthetical in original). Based on those principles and our review of the record, we find substantial evidence to support the Commission's finding that the three advertisements were misleading.

[4] BBD&O contends the Commission acted improperly in holding it liable under section 5. The standard of care to be exercised by an advertising agency in determining what express and implied representations are contained in an ad and in assessing the truth or falsity of those representations increases in direct relation to the advertising agency's participation in the commercial project. *See Doherty, Clifford, Steers & Shenfield, Inc.* v. *FTC*, 392 F.2d 921, 928 (6th Cir. 1968). The degree of its participation is measured by a number of factors including the agency's role in writing and editing the text of the ad, its work in creating and designing the graphic or audio-visual material, its research and analysis of public opinions and attitudes, and its selection of the appropriate audience for the advertising message. Precisely these factors were weighed in reaching the conclusion that BBD&O knew or should have known of the deceptive nature of the F-310 advertising. The Commission determined that:

> Representatives of BBD&O were involved in the development of the F-310 advertising from the very earliest stages. They carefully reviewed all the tests and were active participants in numerous meetings in which alternative advertising approaches were evaluated and ultimately accepted or rejected. The final determination to use the demonstration format of the January 1970 advertisements was a joint decision of representatives of BBD&O and Standard, and after the final joint decision was made, BBD&O actively participated in the filming of the pictorial portions of the advertisements, the drafting of the verbal texts, the preparation of layouts and the promotion and distribution of the advertisements.

Record vol. V, at 3480 (footnotes omitted).

The advertising agency argues vigorously that it was entitled to rely on the elaborate safeguards, including independent laboratory tests and procedures for high level review, that preceded this advertising campaign. The network advertising here in question was approved by the following persons and departments: Chevron Research;

Standard's Product Engineering, Advertising, and Law Departments; the highest level of Standard's corporate management; executives of BBD&O who handle Standard's account; BBD&O's corporate management and legal counsel; Scott Research Laboratories, a highly reputable independent laboratory which reviewed each of the auto emissions tests; and Scott Carpenter, a former NASA astronaut and qualified engineer, who made an independent review of the technical reports on F-310 before agreeing to act as the announcer for the advertisements.

[5] These safeguards and procedures are highly relevant to the petitioners' common defenses, including the truth of the message which the ads conveyed, and to BBD&O's claim that it exercised diligence in investigating the accuracy of the advertising. Nevertheless, review of the record indicates that while the technical accuracy of the tests was fully investigated, the review procedures did not have a specific focus on the accuracy of the implicit representations the ads conveyed to the viewing public. No specialized engineer was needed to put BBD&O on notice that a gauge which drops from a reading of 100 ("dirty") to 20 ("clean") implies a sweeping representation with reference to the change in level of pollution discharge. In light of the advertising agency's active participation in developing this advertising, it was BBD&O's responsibility to assure itself not only that the gauge was not rigged, but also that use of the gauge did not convey a distorted impression. The evidence is fully adequate to support the Commission's findings that, given the degree of participation by this advertising agency, it knew or should have known that the F-310 ads were misleading in the respects previously indicated.

Breadth of the Order

Although the violation with which Standard and BBD&O were charged was based on three commercials advertising a single product, the cease and desist order issued by the Commission related to *any* product and enjoined both petitioners from all advertising which creates a misleading impression by use of tests or demonstrations or by visual means generally.[3] An all-products order against one who has violated section 5 is not unprecedented, *see, e.g., FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 85 S.Ct. 1035, 13 L.Ed.2d 904 (1965);

[3] The final order relating to Standard required, among other things, that the company refrain from making certain representations with respect to the characteristics of F-310 "or any other product in commerce" unless every such representation is true and is completely substantiated by competent scientific tests; from advertising any product by a visual means which directly or by implication creates a misleading impression as to the true state of material facts; and from advertising any product through use of a test or experiment which purports to confirm a product characteristic or the truth of a representation but which does not accurately demonstrate that characteristic or representation. The cease and desist order directed to BBD&O included a prohibition against advertising F-310 or "any other product in commerce" by using a test or experiment to prove a fact or product characteristic when the test does not accurately demonstrate the fact or characteristic, unless BBD&O can establish that it neither knew nor on reasonable inquiry could have known of the inaccuracy; and from advertising any product by a visual means which directly or by implication creates a misleading impression as to the true state of facts, unless BBD&O can establish that it could not reasonably have known the true facts.

however, the order issued in this case was exceptionally burdensome by reason of its breadth and generality.

The over-breadth of the order results from its coverage of "any . . . product in commerce" which is advertised by Standard or BBD&O. The products manufactured and sold by Standard and its subsidiaries number in the thousands and include, in addition to fuel and lubricant products, waxes, fertilizers, pesticides, garden equipment, and cook books. The FTC order, by its terms, requires petitioners to submit a written report "setting forth in detail the manner and form of . . . compliance" with the order. By letter, the FTC directed that such report include: "All advertising (TV, radio, newspapers, etc.), brochures, mailers, promotional material, etc., relating to all products covered by the Order, together with documentation in support of each claim." A duty to compile such materials on the large number of Standard's diverse products is nothing short of oppressive. The same applies to BBD&O, a national firm representing customers in almost every commercial endeavor which relies upon advertising. The agency misused its discretion in issuing the order.

The order's generality adds to its burdensome character. Various paragraphs of the Commission's order are framed in language which amounts to a restatement of general principles of fair advertising. In effect the petitioners are simply enjoined from violating the law.[4] The Supreme Court has expressly disapproved of such nonspecific FTC orders.

> The severity of possible penalties prescribed by the [1959 amendments to section 11 of the Clayton Act] for violations of orders which have become final underlies the necessity for fashioning orders which are, at the outset, sufficiently clear and precise to avoid raising serious questions as to their meaning and application.

FTC v. *Henry Broch & Co.*, 368 U.S. 360, 367-68, 82 S.Ct. 431, 436, 7 L.Ed.2d 353 (1962). *See Country Tweeds, Inc.* v. *FTC*, 326 F.2d 144, 149 (2d Cir. 1964). Orders worded in such general language are disfavored because they alter the scheme of penalties and enforcement procedures defined by the Act without specific identification of

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[4] For example, as to all products sold or advertised by Standard, the order directs the company to cease and desist from:

> Using any pictorial or other visual means of communication with or without an accompanying verbal text which directly or by implication creates a misleading impression in the minds of viewers as to the true state of material facts which are the subject of said pictures or other visual means of communication.

Record, vol. V, at 3453. Similarly, BBD&O was ordered to cease and desist from:

> Using any pictorial or other visual means of communication with or without an accompanying verbal text which directly or by implication creates a misleading impression in the minds of viewers as to the true state of material facts which are the subject of said pictures or other visual means of communication unless the respondent can establish it neither knew nor had reason to know nor upon reasonable inquiry could have known the true facts.

Id. at 3456.

the proscribed conduct. A cease and desist order transfers responsibility for enforcement of the Act from the Commission to the district courts, *American Home Products Corp.* v. *FTC,* 402 F.2d 232, 237 (6th Cir. 1968), thereby causing a short-circuit in the normal procedure which gives an alleged section 5 violator a full hearing before the Commission.

The Commission argues that any vagueness in the order may be cured if petitioners seek the Commission's advice as to the application or proper interpretation of the order. But this suggestion does not reach the core of the problem. The vice inherent in an overly broad order lies not only in the imposition of an additional penalty for any violation, but also in the requirement that one who is subject to its terms must "either expose his major business decisions to a Commission veto, or remain in the dark regarding their legal consequences . . .."

Joseph A. Kaplan & Sons v. *FTC,* 121 U.S. App.D.C. 1, 7, 347 F.2d 785, 791 (1965).

[6, 7] We recognize that the Commission is allowed wide latitude in structuring its remedies based on its expertise in determining what is necessary to eliminate unfair practices and its administrative responsibilitity to devise remedies according to a consistent statutory policy. *FTC* v. *National Lead Co.,* 352 U.S. 419, 428-29, 77 S.Ct. 502, 1 L.Ed.2d 438 (1957); *Carter Products, Inc.* v. *FTC,* 268 F.2d 461, 498 (9th Cir.), *cert. denied,* 361 U.S. 884, 80 S.Ct. 155, 4 L.Ed.2d 120 (1959); *see Resort Car Rental System, Inc.* v. *FTC,* 518 F.2d 962, 964 (9th Cir.), *cert. denied,* 423 U.S. 827, 96 S.Ct. 41, 46 L.Ed.2d 42, (1975). However, the FTC's discretion to formulate cease and desist orders is not unlimited. The remedy selected by the Commission must have a "reasonable relation to the unlawful practices found to exist." *FTC* v. *Colgate-Palmolive Co.,* 380 U.S. 374, 394-95, 85 S.Ct. 1035, 1048, 13 L.Ed.2d 904 (1965); *National Lead,* 352 U.S. at 429, 77 S.Ct. 502; *Carter Products,* 268 F.2d at 498. "The propriety of a broad order depends upon the specific circumstances of the case . . .." *Colgate,* 380 U.S. at 394, 85 S.Ct. at 1048; *see Feitler* v. *FTC,* 201 F.2d 790, 794 (9th Cir.), *cert. denied,* 346 U.S. 814, 74 S.Ct. 24, 98 L.Ed. 341 (1953). Among the circumstances which should be considered in evaluating the relation between the order and the unlawful practice are whether the respondents acted in blatant and utter disregard of the law, and whether they had a history of engaging in unfair trade practices. *National Lead,* 352 U.S. at 429-30, 77 S.Ct. 502; *Floersheim* v. *FTC,* 411 F.2d 874, 875 n.1, 878 (9th Cir. 1969), *cert. denied,* 396 U.S. 1002, 90 S.Ct. 551, 24 L.Ed.2d 494 (1970); *see Joseph A. Kaplan & Sons* v. *FTC,* 121 U.S.App.D.C. 1, 5 n. 8, 347 F.2d 785, 789 n. 8 (1965).

[8, 9] Moreover, first amendment considerations dictate that the Commission exercise restraint in formulating remedial orders which may amount to a prior restaint on protected commercial speech.

Beneficial Corp. v. *FTC*, 542 F.2d 611, 619-20 (3d Cir. 1976), *cert. denied*, 430 U.S. 983, 97 S.Ct. 1679, 52 L.Ed.2d 377 (1977); *see Bates* v. *State Bar of Arizona*, 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977); *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976). The cease and desist orders issued by the Commission in this case unquestionably burden Standard's and BBD&O's advertising capacity. Although it is generally accepted that false commercial advertising may be prohibited, *see Virginia State Board of Pharmacy*, 425 U.S. at 771 & n. 24, 96 S.Ct. 1817; *FTC* v. *Simeon Management Corp.*, 532 F.2d 708, 713 (9th Cir. 1976), and cases cited therein, these orders go far beyond elimination of the specific misrepresentations which were made and also beyond what in fairness could be deemed necessary to deter future unlawful conduct.[5] In the emerging law of first amendment protection for commercial speech, one of the first principles is that "such speech serves individual and societal interests in assuring informed and reliable decisionmaking." *Bates*, 433 U.S. at 364, 97 S.Ct. at 2699. At a minimum, administrative agencies may not pursue rigorous enforcement to the extent of discouraging advertising with no concomitant gain in assuring accuracy and truthfulness.

[10] We hold that the blanket order issued by the Commision is wholly unwarranted by the circumstances of this case. Publication of the three advertisements in question was not a blatant disregard of the law. Petitioners' error was to miscalculate the effect which the televised commercials would have on the public; the major claims made for the product were valid. The Commission itself found that the additive was a "laudable" product, effective in eliminating at least some buildup of dirt in all car engines.[6] The FTC's charges that F-310 does not significantly reduce auto emission pollution were eventually dismissed, and the Commission expressly found that

the reduction in automotive air pollution, which would result from the general use of F-310, would exceed in most instances and approximate in others the reductions achieved from various emissions control programs adopted, enforced or approved by government agencies.

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[5] *Compare Warner-Lambert Co.* v. *FTC*, 183 U.S.App.D.C. 230, 249-52, 562 F.2d 749, 763-71 (1977) (supplemental opinion on petition for rehearing), *appeal dismissed*, 435 U.S. 950, 98 S.Ct. 1575, 55 L.Ed.2d 800 (1978). That case held that an FTC order requiring a § 5 violator to do corrective advertising did not violate the first amendment where the facts made it "eminently clear" that the important government objective of protecting citizens against deception could not have accomplished by any less restrictive means.

[6] [It] removes and reduces the buildup of deposits in carburetors, intake manifolds, intake ports and on intake valves and PCV valves, and minimizes the buildup of sludge and varnish on pistons, piston rings, valve lifters, oil screens, oil pump relief valves and throughout the crankcase area of dirty engines. The degree of improvement necessarily depends upon the condition of the engine. In the case of new cars or cars with clean engines, F-310 will prevent or minimize the accumulation of such deposits.

Record, vol. V, at 3451 (adopting finding of the administrative law judge).

Record, vol. V, at 3451 (adopting finding 31 of the administrative law judge). The misrepresentations in the ads pertained to the extent of pollution reduction; they did not amount to a wholly false claim about an inferior product.

This case is thus distinguishable from *FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 85 S.Ct. 1035, 13 L.Ed.2d 904 (1965), where the Supreme Court upheld an all-products order since "the Commission [had] a sufficient basis for believing that the respondents would be inclined to use similar commercials with respect to the other products they advertise." *Id.* at 395, 85 S.Ct. at 1048. The violation in *Colgate* justified a comprehensive cease and desist order because the advertising indicated the company's utter disregard of the law. In contrast, the vice of petitioners' advertising was a failure to provide sufficient information for the public fully to evaluate the efficacy of the product. Moreover, in *Colgate* the violation involved use of a deceptive mock-up, a technique that was directly applicable to the advertising of many other types of products. In the instant case the petitioners' violations involved use of a visual image which was misleading by implication because of the specific subject matter of the advertising. The violations were not a technique of deception that easily could be transferred to an advertising campaign for some other product.

Standard has never before been accused of false advertising, and BBD&O, the nation's third largest domestic advertising agency, has had one FTC consent order entered against it. The breadth of these orders cannot be justified by characterizing petitioners as habitual violators of the Act for whom special deterrence is required. *See Grove Laboratories* v. *FTC*, 418 F.2d 489 (5th Cir. 1969); *American Home Products Corp.* v. *FTC*, 402 F.2d 232 (6th Cir. 1968).

The circumstances surrounding the violation, including the nature of the offense, the procedures used to evaluate the ads before broadcasting, the good faith attempt to eliminate rapidly the implied misstatements, and the previous good record of the parties, indicate that Standard and BBD&O did not act in blatant disregard of their responsibilities under the Act. We therefore hold that the exceptionally broad orders issued by the FTC in this case bear no "reasonable relation to the unlawful practices found to exist." Both orders shall be modified so that they refer only to future advertising of F-310. As so modified, the order of the Commission will be affirmed.

FEDERAL TRADE COMMISSION
v.
GENERAL MOTORS CORPORATION, et al.*

Civ. A. No. C77-927. F.T.C. File No. 99-373.

(United States District Court, Northern District of Ohio, July 7, 1978)

Upon reconsideration, the Court withdrew the portion of its June 2, 1978 order which held that section 6(f) of the FTC Act barred the Commission from releasing names of consumers who had complained of General Motors to the Attorney General of Kentucky. The Court found that its decision was premature since the FTC had not planned to release the names. Court also modified the portion of its previous order which required the Commission to give defendants notice prior to the release of documents submitted by GM which contain information that is in the public domain.

Before WILLIAM K. THOMAS, *District Judge.*

ORDER

Upon reconsideration, this court's memorandum and order of June 2, 1978 is modified in the following respects:

1. The letter of April 13, 1978 from Michael N. Sohn to Richard W. Pogue, not previously considered by the court, indicates that the court erred in its memorandum of June 2, 1978 in concluding that the Commission planned disclosure of "consumer names" to the Kentucky Attorney General. It was therefore premature for this court to conclude that such a planned disclosure "would violate section 6(f) and constitute an abuse of discretion." Such finding and discussion of this issue are therefore ordered withdrawn from the June 2 memorandum and order. The court accepts the Commission's statement that it will give GM ten days advance notice of any decision to release such names.

2. The court adds to the list of responses "undisputedly in the public domain [which] need not be subjected to a ten-day advance notice requirement" the responses to specification 1 (except insofar as an advance notice commitment has already been granted by the Commission), 6 (but only to the extent such responses "are included in GM's response to Specification 5(a)"), 7, 11 and 12.

In all other respects the motion for reconsideration is denied.

It Is So Ordered.

*Not otherwise reported.

In Re F.T.C. LINE OF BUSINESS REPORT LITIGATION*

No. 77-1728 *et al.* F.T.C. File Nos. 99-196, 99-199, 99-308.

In Re F.T.C. CORPORATE PATTERNS REPORT LITIGATION*

No. 77-1732 *et al.* F.T.C. File Nos. 99-281, 99-287, 99-318.

(United States Court of Appeals, District of Columbia Circuit, July 10, 1978, As Amended July 20, 1978)†

1. WHEN EXERCISING ITS AUTHORITY TO REQUIRE INFORMATIONAL REPORTS FROM CORPORATIONS, FTC IS NOT REQUIRED TO OBSERVE APA RULEMAKING PROCEDURES.

   [686] The Federal Trade Commission Act does not obligate the Federal Trade Commision to observe Administrative Procedure Act rule-making procedures when exercising its authority to require informational reporting by corporations.

2. APA'S DEFINITION OF RULE EMBRACES NEITHER FTC'S LINE OF BUSINESS PROGRAM NOR ITS CORPORATE PATTERNS REPORT SURVEY.

   Neither Federal Trade Commision's line of business program nor its corporate patterns report survey was embraced by Administrative Procedure Act's definition of rule.

3. FTC'S CORPORATE REPORTING PROGRAMS WERE NOT SUBJECT TO APA'S RULEMAKING PROCEDURES, SINCE THEY WERE INVESTIGATIVE IN NATURE.

   Federal Trade Commission's line of business program and its corporate patterns report program were investigative in character and therefore were not subject to rule-making procedures of the Administrative Procedure Act.

4. PROVISION OF CENSUS ACT WHICH PROTECTS COMPANY-RETAINED COPIES OF CENSUS REPORTS FROM COMPELLED DISCLOSURE TO GOVERNMENT AGENCIES WAS NOT VIOLATED BECAUSE FTC'S CORPORATE PATTERNS REPORT FORM INCLUDED A QUESTION SIMILAR TO INQUIRY IN CENSUS BUREAU'S SURVEY OF MANUFACTURERS.

   Federal Trade Commission's corporate patterns report program which included a question similar to inquiry made by Census Bureau in the survey of manufacturers did not violate confidentiality provision of the Census Act which safeguarded company-retained copies of census reports from compelling disclosure to any government agencies.

5. FTC'S CORPORATE REPORTING PROGRAMS ARE NOT SUBJECT TO ARBITRARY AND CAPRICIOUS STANDARD OF THE APA, SINCE THEY DO NOT CONSTITUTE "AGENCY ACTION."

   Federal Trade Commission's line of business program and corporate pattern report program did not constitute "agency action" subject to arbitrary and capricious standard of the Administrative Procedure Act.

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*Reported in 595 F.2d 685 (1978). *Cert. Denied,* Nov. 6, 1978, 439 U.S. 958, 99 S.Ct. 362.

†Because of the large number of footnotes accompanying this opinion, and for reasons of simplicity of typesetting, all footnotes can be found listed at the end of this opinion beginning page 205 herein.

6. SCOPE OF REVIEW FOR ENFORCEMENT OF FTC'S LB AND CPR ORDERS IS RESTRICTED TO THAT FOUND APPROPRIATE FOR COMPULSORY PROCESS ENFORCEMENT.

Limited scope of review appropriate for compulsory process enforcement is applicable to enforcement of Federal Trade Commission orders requiring corporations to file financial performance reports as part of Commission's line of business program and corporate patterns report program.

7. THAT SOUGHT DATA WAS RELEVANT TO FTC'S GENERAL PURPOSE OF GATHERING FINANCIAL INFORMATION TO ASSESS INDUSTRY-BY-INDUSTRY PERFORMANCE AND MARKET STRUCTURE WAS SUSTAINED BY EVIDENCE.

In action brought by Federal Trade Commission to compel corporations to file financial performance reports as part of Commission's line of business program and corporate patterns report program, evidence sustained finding that data sought by Commission was relevant to the agency's general purpose of collecting corporate fi[687]nancial information in order to assess industry by industry performance and market structure.

8. WHERE REQUESTS FOR FINANCIAL PERFORMANCE REPORTS WAS RELEVANT TO LAWFUL PURPOSE OF FTC'S INQUIRY, AND CORPORATIONS FAILED TO CARRY THEIR BURDEN OF SHOWING THAT COMPLIANCE THREATENED TO DISRUPT OR UNDULY HINDER NORMAL OPERATION OF BUSINESS, REASONABLENESS OF REQUEST WOULD BE PRESUMED.

Burden of demonstrating that Federal Trade Commission request for financial performance reports of corporations was unduly burdensome was on the corporations; if inquiry was conducted pursuant to lawful purpose and request was relevant to that objective, its reasonableness would be presumed absent a showing that compliance threatened to disrupt or unduly hinder the normal operations of business.

9. FINDING THAT FTC'S LINE OF BUSINESS REPORTING REQUIREMENTS DID NOT IMPOSE AN UNDUE BURDEN ON CORPORATIONS WAS SUSTAINED BY EVIDENCE.

In action brought by Federal Trade Commission to compel corporations to file financial performance reports as part of Commission's line of business program and corporate patterns report program, evidence sustained finding that Commission's line of business reporting requirements did not impose an undue burden on corporations.

10. DISTRICT COURT'S INDEPENDENT CONSIDERATION OF RELEVANCE AND BURDENSOMENESS WAS NOT IN ERROR.

In action brought by Federal Trade Commission to compel corporations to file financial performance reports as part of Commission's line of business program and corporate patterns report program, trial court did not err in considering relevance and burdensomeness independently.

11. DISTRICT COURT WAS NOT DEPRIVED OF SUBJECT MATTER JURISDICTION BECAUSE FTC HAD FILED PETITION RATHER THAN COMPLAINT TO COMPEL COMPLIANCE WITH ITS REPORTING REQUIREMENTS.

In action brought by Federal Trade Commission to compel corporation to file financial performance reports as part of Commission's line of business and corporate patterns report programs, Commission's filing of petition instead of complaint did not deprive district court of subject matter jurisdiction.

12. RULES OF CIVIL PROCEDURE DO NOT PROHIBIT SUMMARY MANDAMUS ENFORCEMENT PROCEEDINGS FOR FTC REPORT ORDERS.

Enforcement of Federal Trade Commission's report orders by summary mandamus procedures did not violate Rules of Civil Procedure.

13. SINCE FTC REGULATIONS ENSURED CONFIDENTIALITY OF LB DATA, AND CORPORATIONS HAD FAILED TO EXHAUST THEIR ADMINISTRATIVE REMEDIES BEFORE PRESENTING CONFIDENTIALITY CLAIM TO COURT, COMPLIANCE WITH FTC LB ORDERS WAS NOT EXCUSED ON GROUND OF POTENTIAL DANGER TO CONFIDENTIAL DATA.

Corporations would not be excused from complying with Federal Trade Commission's orders to file financial performance reports as part of Commission's line of business program on ground of potential jeopardy to confidential information, since Commission was required by its own regulations to insure confidential treatment of such information and since corporations were required to exhaust their administrative remedies with respect to their claims of confidentiality before resorting to courts.

14. ALTHOUGH DISTRICT COURT'S ORDER PROTECTING CORPORATIONS FROM PRECIPITOUS FTC ACTION PENDING EXHAUSTION OF ADMINISTRATIVE REMEDIES WAS PROPER, ABSENT A FINAL FTC DECISION TO PUBLISH CPR DATA, CLAIM THAT SUCH DATA CONSTITUTED "TRADE SECRETS" BARRED FROM PUBLICATION WAS PREMATURE AND DID NOT EXCUSE APPELLANTS FROM COMPLYING WITH FTC'S CPR ORDERS.

Corporations would not be excused from complying with Federal Trade Commission's order to file financial performance reports as part of Commission's corporate patterns report program on ground that such data constituted "trade secrets" barred from publication, since Commission had made no final decision to publish data in question and thus corporations' claim was premature; however, district court's order protecting corporations from any precipitous action on the part of Commission before corporations could exhaust their administrative remedies was properly issued.

15. SINCE POTENTIAL JEOPARDY OF PROCEDURAL RIGHTS DOES NOT IMPINGE UPON FTC'S RIGHT TO COLLECT INFORMATION, BUT ONLY UPON AGENCY'S USE OF THE INFORMATION, APPELLANTS CANNOT BE EXCUSED FROM COMPLYING WITH FTC SPECIAL REPORTS ORDERS ON GROUND THAT DATA MAY BE USED AGAINST THEM IN ADJUDICATIVE PROCEEDINGS.

Corporations would not be excused from complying with Federal Trade Commission's order to file financial performance reports as part of Commission's line of business and corporate patterns report programs on ground that data obtained might be used by Commission's complaint counsel in adjudicative proceedings against corporations, since any potential jeopardy of procedural rights in adjudicative proceedings did not impinge upon Commission's right to col[688]lect the information in question, but only upon the use to which the information might be put.

16. AGENCY'S INTERPRETATION OF ITS STATUTORY MANDATE CARRIES GREAT WEIGHT.

Great weight must be given to agency's interpretation of its statutory mandate.

17. COMPTROLLER WAS NOT REQUIRED TO CONSIDER WHETHER SOUGHT DATA WAS APPROPRIATE TO FTC'S EXPRESSED NEED, IN

APPROVING LINE OF BUSINESS SURVEY FORM, ONLY WHETHER DATA WAS AVAILABLE FROM ANOTHER FEDERAL SOURCE, AND WHETHER CORPORATION'S BURDEN OF COMPLIANCE HAD BEEN SUFFICIENTLY MINIMIZED.

In approving Federal Trade Commission's line of business survey form, Comptroller General properly considered whether information sought was available to Commission from another federal source and whether Commission had sufficiently minimized corporations' burden of compliance with reporting requirement; Comptroller was not obliged to determine in addition that data sought was appropriate to Commission's expressed need.

Federal Trade Commission brought action to compel corporations to file financial performance reports as part of Commission's line of business and corporate patterns report surveys. The United States District Court for the District of Columbia, Thomas A. Flannery, J., granted summary judgment to Commission, and defendants appealed. The Court of Appeals held that: (1) evidence sustained finding that data sought by Commission was relevant to agency's general purpose; (2) evidence sustained finding that Commission's line of business reporting requirements did not impose an undue burden on corporations; (3) corporations were not excused from complying with Commission's orders to file financial performance reports as part of Commission's line of business program and corporate patterns report program, and (4) in approving Federal Trade Commission's line of business survey form, Comptroller General properly considered whether information sought was avaialable to Commission from another federal source, and whether Commission had sufficiently minimized corporations' burden of compliance with reporting requirement; Comptroller was not obliged to determine in addition that data sought was appropriate to Commission's expressed need.

Affirmed.

(Syllabus, with substituted captions, taken from 595 F.2d 685)

Appeals from the United States District Court for the District of Columbia (Misc. No. 76-127) (Misc. Civil Action No. 76-0127) (Civil Action No. 76-1095) (Civil Action No. 76-1109) (Misc. No. 76-0127) (Misc. Civil Action No. 76-0127) (Civil Action Misc. No. 76-0127) (Misc. No. 76-0126) (Misc. Civil Action No. 76-0216) (Civil Action No. 76-1123) (Misc. Civil Action No. 76-0126).

J. Randolph Wilson, with whom *John S. Koch,* and *Steven S. Rosenthal* were on the brief, for appellants Air Products and Chemicals, Inc., *et al.,* in Nos. 77-1728 and 77-1732.

Lee A. Rau, with whom *Edward T. Tait, John M. Wood* and *Stuart M. Gerson* were on the brief for appellants American Air Filter Co., Inc., *et al.,* in Nos. 77-1728 and 77-1732.

Mark A. Jacoby with whom *Ira M. Millstein* and *Salem M. Katsh* were on the brief, for appellants Aluminum Co. of America, *et al.,* in Nos. 77-1728 and 77-1732.

John C. Reitz was on the brief, for appellants American Greetings Corp., *et al.*, in Nos. 77-1728 and 77-1732.

James R. Henderson was on the brief, for appellants, Inland Steel Co., *et al.*, in Nos. 77-1728 and 77-1732.

John F. Graybeal and *Robert C. Houser, Jr.* were on the brief, for appellant Square D Co., in Nos. 77-1728 and 77-1732.

Andrew S. Krulwich was on the brief for appellant Hoffman LaRoche, in No. 77-1732, and for appellant Lone Star Industries, Inc., in No. 77-1728.

Philip J. Davis was on the brief, for appellant Chemetron Corp., in Nos. 77-1728 and 77-1732.

James F. Rill was on the brief, for appellant Carpenter Technology Corp., *et al.*, in No. 77-1732, and for appellant A. E. Staley Manufacturing Co. in No. 77-1728.

James F. Bromley was on the brief, for appellant United States Gypsum Co. in Nos. 77-1728 and 77-1732.

Ronald P. Wertheim was on the brief, for appellant Ashland Oil, Inc., in Nos. 77-1728 and 77-1732.

Daniel K. Mayers and *Neil J. King* were on the brief, for appellants The Babcock and Wilcox Co., *et al.*, in Nos. 77-1728 and 77-1732.

William C. Collishaw was on the brief, for appellant White Consolidated Industries, Inc., in Nos. 77-1728 and 77-1732.

Samuel K. Abrams and *Wilbur L. Fugate* were on the brief, for appellants Cone Mills Corp., *et al.*, in Nos. 77-1728 and 77-1732.

Raymond E. Vickery, Jr. was on the brief, for appellants Hughes Tool Co., *et al.*, in No. 77-1732.

Ramsay D. Potts and *Steven L. Meltzer* were on the brief, for appellant Emerson Electric Co., in Nos. 77-1728 and 77-1732.

Milton Wolson and *S. White Rhyne, Jr.* were on the brief, for appellant SCM Corp., in Nos. 77-1728 and 77-1732.

Albert R. Connelly was on the brief, for appellant Bethlehem Steel Corp., *et al.*, in Nos. 77-1728 and 77-1732.

Edwin E. Rockefeller and *Alan M. Frey* were on the brief, for appellant Norton Simon, Inc., in Nos. 77-1728 and 77-1732.

David J. Lewis and *Elroy H. Wolff* were on the brief, for appellants Thomas Lipton, Inc., *et al.*, in Nos. 77-1728 and 77-1732.

Anthony B. Barton was on the brief, for appellant, American Maize-Products Co., in Nos. 77-1728 and 77-1732.

Eve E. Backrack was on the brief, for appellant Food Fair Stores, Inc., in No. 77-1732, and for appellant C.I.T. Financial Corp., in No. 77-1728.

Coswell O. Hobbs, III, was on the brief, for American Stores Co., in No. 77-1732.

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J. Stanley Stroud was on the brief, for appellants CPC International, Inc., *et al.,* in No. 77-1728.

David B. Lytle was on the brief, for appellant, Republic Steel Corp., in No. 77-1728.

Joseph W. Burns was on the brief, for appellant Ingersoll-Rand Co., in No. 77-1728.

Ronald G. Precup was on the brief, for appellant American Beef Packers, Inc., in No. 77-1728.

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William Simon, Harold F. Baker, David C. Murchison, J. Wallace Adair, John DeQ. Briggs, III, and *Stuart H. Harris* were on the brief, for appellants American Cyanamid Co., *et al.,* in Nos. 77-1728, 77-1732, 77-1930 and 77-1931.

Robert E. Jordan, III, Edward E. Vaill and *Robert M. Goolrick* were on the brief, for appellant, Atlantic Richfield Co., in Nos. 77-1728 and 77-1732.

Andrew J. Kilcarr and *Vincent Tricarico* were on the brief, for appellant Mobil Oil Corp., in Nos. 77-1728 and 77-1732.

Jesse P. Luton, Jr., John E. Bailey and *Kevin F. Cunningham* were on the brief, for appellant Gulf Oil Corp., in Nos. 77-1728 and 77-1732.

Paul J. Newlon, Victoria G. Traube and *Michael A. Lampert* were on the brief, for appellant Milliken and Co., *et al.,* in Nos. 77-1728, 77-1732, 77-1942, 77-1943 and 77-1944.

Leslie W. Jacobs was on the brief, for appellant The Goodyear Tire and Rubber Co., *et al.,* in Nos. 77-1728 and 77-1732.

Gerald P. Norton, Deputy General Counsel, Federal Trade Commission with whom *Jerald D. Cummins,* Acting Assistant General

Counsel, *Joanne L. Levine, Sophie A. Krasik, Thomas A. Sheehan* and *Arthur W. Adelberg,* Attorneys, Federal Trade Commission, were on the briefs, for appellees Federal Trade Commission, in Nos. 77-1728, 77-1732, 77-1930, 77-1931, 77-1942, 77-1943, 77-1944, 77-1947 and 77-1956, and cross-appellants in Nos. 77-1952 and 77-1953.

Frank A. Rosenfeld, Attorney, Department of Justice with whom *Earl J. Silbert,* United States Attorney, *Barbara Allen Babcock,* Assistant Attorney General, and *Leonard Schaitman,* Attorney, Department of Justice, were on the brief, for appellee Comptroller General, in No. 77-1728.

Before BAZELON and ROBINSON, *Circuit Judges,* and AUBREY E. ROBINSON, JR.,†† *District Judge,* United States District Court for the District of Columbia.

Opinion PER CURIAM.

[690] We review the decisions of the District Court granting summary judgment to the Federal Trade Commission (Commission or FTC) and enforcing the Commission's orders requiring appellant corporations to file financial performance reports as part of the Line of Business (LB) and Corporate Patterns Report (CPR) surveys.[1] These two broad-based statistical surveys are conducted by the FTC pursuant to its authority under Section 6(b) of the Federal Trade Commission Act, which empowers the Commission to require corporations to file informational reports regarding the company's "organization, business, conduct, practices, management, and relations to other corporations."[2]

I. THE FTC SURVEYS

A. *The Line of Business Program.*

In August 1975, as part of the Line of Business survey, the Commission ordered 450 of the nation's largest domestic manufacturing concerns to file reports disclosing certain indicia of financial performance for 1974.[3] The 1974 LB form sent to each **[691]** corporate respondent consists of four schedules.[4] Schedule I seeks information identifying the company and its subsidiaries. Schedule II elicits a description of the company's lines of business. Schedule III, the heart of the form, exacts specific financial and statistical data—including revenues, costs, profits and assets—for each of the company's lines of business. Schedule IV requires reconciliation with other parts of the form and with the company's published financial

†† Sitting by designation pursuant to 28 U.S.C. § 292(a) (1970).

data. The key feature of the survey is its requirement that each company present its financial performance statistics in terms of a uniform set of market categories.[5]

The Commission proposes to aggregate the LB statistics within each market category in order to identify areas of the economy in which profits are relatively high or low and to assess relationships between market structure and performance, and to use this information to target particular markets for industry-wide investigations into potential antitrust violations or unfair trade practices.[6] Since corporate financial performance data otherwise available to the Commission are not reported in terms of uniform market categories, the LB survey is expected to provide the only performance statistics susceptible to comparison on an industry-by-industry basis.[7] Aside from internal use of the LB data, the Commission has indicated an interest in publishing the aggregate market statistics to facilitate efforts by investors, managers and scholars to further the effectiveness of the competitive system.[8]

The Commission began developing the Line of Business form in 1970. After extended consideration and extensive revisions, a limited survey was conducted to collect 1973 data.[9] Revisions were made as a result of the Commission's experience with the 1973 survey, and in April 1975 the Commission published the proposed 1974 LB form in the Federal Register and solicited comments.[10] In addition, the FTC distributed copies of the proposed form and the Commission's supporting statement to numerous interested parties, inviting their responses.[11] On May 20, 1975, the full Commission conducted a hearing at which testimony was elicited from twenty witnesses [692] regarding the proposed LB program.[12] After considering the nearly 100 comments received and the testimony presented, the FTC revised the LB form and submitted it to the General Accounting Office (GAO) for clearance under the Federal Reports Act.[13] Notice was published again in the Federal Register and comments were solicited by the GAO.[14] Upon consideration of the comments received, the GAO approved the LB form for use by the FTC in a letter detailing its deliberations.[15] The Line of Business orders were subsequently served on approximately 450 corporations.[16] Motions to quash the LB orders were made by 180 companies[17] and denied by the Commission in a statement responding to the objections advanced by the corporations.[18]

B. *The Corporate Patterns Report Program.*

The Corporate Patterns Report survey requires over 1100 major domestic corporations to report the value of shipments from their

domestic manufacturing establishments in 1972, in terms of product classifications developed by the Census Bureau for use in the Quinquennial Census of Manufactures.[19] The CPR survey also solicits 1972 data regarding, *inter alia*, consolidated net manufacturing activities and major acquisitions and disposals since 1972.[20] As with the LB program, the FTC proposes to use the CPR survey to create a data bank on market structures for use by the Commission in antitrust enforcement, economic analysis and policy planning.[21] The value of shipments data will be used in conjunction with aggregate data published by the Census Bureau based on similar information contained in the 1972 Census of Manufactures.[22]

The Corporate Patterns Report survey was considered initially by the Commission in 1972.[23] After testing the proposed form on a small number of companies and effecting some modifications,[24] the FTC submitted the CPR form to the General Accounting Office for clearance as required under the Federal Reports Act. The GAO published notice of the proposed survey in the Federal Register and solicited comments.[25] The comments received were duly considered, and the GAO approved the CPR [693] form in a letter to the FTC detailing the substance of these comments.[26] In addition to entertaining the comments supplied by the GAO, the FTC conferred with representatives from the Census Bureau and the Office of Management and Budget in a public meeting in June 1975[27] and less formally on other occasions. In July 1975 the Commission adopted a resolution authorizing the use of compulsory process,[28] and the Corporate Patterns Report orders were served on 1100 companies.[29] In response, motions to quash were filed by 390 companies raising numerous factual and legal objections.[30] In an effort to accommodate corporate claims, the Commission deleted an unduly burdensome requirement that each company rank itself as to each product category and responded to each of the corporations' objections in a letter denying the motions to quash.[31]

II. DISCUSSION

Enforcement actions were commenced in the District Court against the companies that had refused to comply with the Commission's orders.[32] Dissatisfied in several respects with the disposition rendered by the trial court, the corporations perfected this appeal. Appellants contend first that the orders in both the LB and CPR surveys were issued in violation of the rulemaking requirements of the Administrative Procedure Act (APA).[33] Second, appellants urge that the CPR survey is invalid because it violates the confidentiality provisions of the Census Act.[34] Third, appellants assert both substan-

tive and procedural errors by the District Court in the enforcement proceeding.[35] Finally, appellants submit that the LB orders are infirm because of the alleged failure of the Comptroller General to review the LB forms in accordance with the requirements of the Federal Reports Act.[36] We address each of these contentions in turn.

A. *Lawfulness of the FTC Report Orders.*

1. Nonapplicability of the Administrative Procedure Act's Rulemaking Requirements.

The Federal Trade Commission Act (FTC Act)[37] provides a clear basis of authority for the Commission to issue orders requiring corporations to submit information reports to the FTC. Section 6(b) of the Act states that the Commission shall have the power

> To require by general or special orders, persons, partnerships, and corporations, engaged in or whose business affects commerce, excepting banks and common carriers subject to the Act to regulate commerce or any class of them or any of them, respectively, to file with the Commission in such form as the Commission may prescribe annual or special, or both annual and special, reports or answers in writing to specific questions, furnishing to the Commission such information as it may require as to the organization, business, conduct, practices, management, and relation to other corporations, partnerships, and individuals of the respective persons, partnerships, and corporations [694] filing such reports or answers in writing.[38]

Appellants claim that the Commission's exercise of this authority, which they do not challenge,[39] in the development and implementation of the Line of Business and Corporate Patterns Report surveys was procedurally improper because the Commission failed to comply with the rulemaking requirements of the Administrative Procedure Act.[40]

[1] Our first inquiry is whether the Federal Trade Commission Act obligates the Commission to observe APA rulemaking procedures when exercising its authority to require informational reporting pursuant to Section 6(b) of the FTC Act. We conclude that neither Section 6(b) nor any other section of the FTC Act requires adherence to the APA's rulemaking procedures nor does any section of the Act prescribe other procedural prerequisites to the exercise of the Commission's authority to require reporting. Section 6(b) states that the Commission by order may require corporations "to file with the Commission in such form as the Commission may prescribe . . . reports or answers in writing to specific questions, furnishing the Commission such information as it may require. . . ."[41] This section assuredly im-

poses no procedural qualification on the exercise of the Commission's authority to gather information. Section 6(g) of the FTC Act empowers the Commission to make rules and regulations for the purpose of carrying out the first eighteen sections of the Act.[42] But this section does not *require* that the FTC engage in rulemaking to implement 6(b) or any other section.[43] Rather, 6(g) simply authorizes the Commission to promulgate rules and regulations if it so desires. This is confirmed by the fact that the first eighteen sections include the subpoena authority of the FTC,[44] the exercise of which is not subject to rulemaking requirements.[45] Hence, Section 6(g) in no wise impugns the Commission's prerogative to order reporting pursuant to Section 6(b) without preliminarily pursuing rulemaking procedures.[46]

[695] [2] Similarly, the Administrative Procedure Act[47] does not independently require rulemaking prior to the issuance of FTC informational report orders. The language and legislative history of the APA suggest a classification of agency activity into three basic categories: rulemaking, adjudication and investigation. The issuance of agency orders to compel the filing of informational reports was plainly regarded an investigative act by the drafters of the APA, not a rule[48] or adjudication. Congressman Walter, a principal sponsor of the APA, described investigative activity in the following terms during floor debate in the House of Representatives:

[696] The third type of administrative compulsory power may be incidental to either legislative or judicial powers of administrative agencies, or it may be entirely independent of either. I refer to the compulsory action of administrative agencies when they issue subpoenas, require records or reports, or undertake mandatory inspections. These functions are investigative in nature.[49]

Investigative acts, specifically including report orders, are encompassed in Section 6(c) of the APA, which states "process, requirement of a report, inspection, or other investigative act or demand may not be issued, made, or enforced except as authorized by law."[50] Section 6(c), then, manifestly applies to the surveys in issue, which exact informational reports from selected corporations. Thus, that provision's limitation that investigative orders "may not be issued, made, or enforced except as authorized by law" has direct bearing on this litigation. That phrase, however, simply refers to the statute authorizing the activity. In this case, the enabling statutory provision is Section 6(b) of the FTC Act, which, as we demonstrated above, does not impose rulemaking upon the FTC.[51] Accordingly, the Commission is not obligated under the Administrative Procedure Act to pursue rulemaking proceedings prior to implementation of the LB and CPR programs.

[3] Our determination that these statistical surveys are investigative in character and therefore not subject to rulemaking procedures is buttressed by an earlier decision of this court in *Montship Lines, Ltd.* v. *Federal Maritime Board*,[52] which held that notice and hearing was not a prerequisite to the issuance of an industry-wide order by the Federal Maritime Board requiring the filing of statistical reports. In the same vein, the Fifth Circuit, in *United States* v. *W. H. Hodges & Co.*,[53] rejected the argument that the Secretary of Agriculture was subject to rulemaking requirements in directing stockyard marketing agencies to file special reports pursuant to a statutory authority that incorporates Section 6(b) of the FTC Act. The Court stated:

> The order at issue here was clearly investigatory in nature, as opposed to an adjudicatory or rulemaking process, and hence not subject to the procedures governing rule-making outlined in the APA. *Cf. Genuine Parts Co.* v. *F.T.C.*, 445 F.2d 1382, 1388 (5th Cir. 1971); K. Davis, *Administrative Law Treatise*, § 3.01 at 159, n.1 (1958).[54]

The LB and CPR surveys, too, are "clearly investigatory in nature" and just as plainly exempt from the Administrative Procedure Act's compulsory rulemaking requirements.[55] [697]

2. Confidentiality Provisions of the Census Act.

[4] We next consider whether the Corporate Patterns Report Program impermissibly affronts the Census Act.[56] Specifically, appellants contend that the CPR survey violates the confidentiality provision of the Census Act, which safeguards company-retained copies of census reports from compelled disclosure to any government agency.[57] Appellants insist that this provision protects not only the actual file copy of the census report, but also the company's statistical data that has been prepared in an assertedly "unique fashion" for the purpose of reporting to the Census Bureau.[58] The corporations argue that the Census Act's protection of retained census report copies insulates companies from any future requirement to respond to questions similar to those which the company has already answered in reports to the Census Bureau. Since the CPR survey includes a question essentially identical to an item on the Census Bureau's 1972 Annual Survey of Manufactures,[59] appellants contend that the FTC is demanding information which the Census Act protects from compelled disclosure.

Both the CPR survey and the 1972 Survey of Manufactures require the respondent corporation to report the value of shipments[60] from its domestic manufacturing establishments during 1972 in terms of product categories developed by the Census Bureau.[61] The Commission plans to assess "the position of firms and of competitive conditions

in various product markets" by comparing the CPR individual company value-of-shipments aggregates from the Survey of Manufactures.[62] To maximize the comparative value of the CPR information, the FTC has concededly utilized definitions and product-class codes similar to those employed by Census.[63]

[698] The confidentiality provision of the Census Act upon which appellants rely, Section 9(a)(3), is explicit in identifying the subject of its protection as "copies of census reports which have been retained."[64] It states that

> [n]o department, bureau, agency, officer, or employee of the Government, except the Secretary in carrying out the purposes of this title, shall require, for any reason, copies of census reports which have been retained by any such establishment or individual. Copies of census reports which have been so retained shall be immune from legal process, and shall not, without the consent of the individual or establishment concerned, be admitted as evidence or used for any purpose in any action, suit, or other judicial or administrative proceeding.[65]

This language unambiguously protects actual file copies of census reports retained by corporations. In fact, appellants' construction extends so far beyond the statute's plain terms that we might fairly reject it without further inquiry. In any event, an examination of the legislative history and purpose of the confidentiality provision of the Census Act equally belies appellants' assertion that the FTC's value-of-shipments inquiry is a circumvention of the Census Act's intended protection.[66]

Section 9(a)(3) was added to the Census Act in 1962[67] in response to the Supreme Court's holding in *St. Regis Paper Co.* v. *United States*[68] that a company's retained copy of its census form was not immune from compulsory disclosure to the Federal Trade Commission under the then-existing confidentiality provision of the Census Act. Prior to *St. Regis*, the Act's immunity, which expressly applied only to census reports in the hands of the Census Bureau,[69] had been construed by some lower federal courts to apply with equal force to the company's retained copy.[70] The Census Bu[699]reau had encouraged companies to preserve copies of their census reports in order to facilitate consistency in their reporting from year to year, and had expressly assured corporations that their reports would not be used "for purposes of taxation, investigation or regulation."[71] The Supreme Court in *St. Regis* held that the Census Bureau's promises could not be enforced without rewriting the Act to protect the company's retained copy of their report—a task for Congress and not the Court.[72]

In the wake of the *St. Regis* decision, and at the request of the Commerce Department,[73] Congress moved promptly to enact legislation "clarifying the intent of the Census Act."[74] In so doing, the legislative history reveals, Congress sought to accommodate both

the interest of the Census Bureau in protecting the file copies of respondents' reports and the interest of the federal regulatory agencies in collecting information needed for regulatory purposes.[75] The House committee considering the amendment specifically rejected language that would have made census "information, reports and other data" immune from legal process, thus clearly undermining appellants' assertion that Congress conferred such broad protection.[76] In its stead, Congress enacted a provision protecting only "copies of census reports which have been retained."[77] In determining not to immunize a company's census "data" and "information" from disclosure, the committee accepted the recommendation of the administration presented in a letter from the Bureau of the Budget included in the House report:

> [C]are must be taken not to extend confidentiality to such an extent as to interfere unduly with responsibilities of other agencies of Government in carrying out functions which require information. These include the antitrust acts and other regulatory acts. . . . [T]he protection to the respondent's file copy of the census reports should apply only to the file copy and not to the information itself or to other records and documents of the company . . .. [A]ny extension of confidentiality beyond the census copy would be strongly opposed by the administration. . . .[78]

[700] In addition, both the House and Senate reports include a letter from the Commerce Department favoring the restriction of the amendment's immunity to actual file copies and interpreting the impact that the limited protection would have on the ability of regulatory agencies to collect information. It stated:

> [T]he ability of a regulatory agency to formulate inquiries, even one identical with those asked by Census, would not be affected. The only restriction would be that the inquiry would not demand an answer by definition identical with that furnished the Census Bureau in another context and for another purpose.[79]

This distinction between a regulatory agency asking a *question* identical to that posed by the Census Bureau, which the FTC concedes it is doing,[80] and requiring an identical *answer,* which the FTC is not doing, is important, for it goes to the very purpose of affording immunity to census reports and their copies.

The legislative history of the 1962 amendment indicates two reasons why confidentiality was considered essential to candid and expeditious census reporting. First, in order to encourage prompt replies to Census questionnaires, companies are implored by the Bureau to "authorize subordinate officials to furnish information directly, without time-consuming formal clearance by comptrollers, auditors, or legal counsel concerned with problems other than statistical reporting."[81] Second, due to the differences in corporate accounting practices and the unavailability of final data at the time

census reports are made, respondents are encouraged to use estimates and approximations.[82] Since a company's unreviewed, estimated or preliminary answers to the Census Bureau might not be suitable for submission to regulatory agencies for uses potentially detrimental to the corporation, the Census Bureau must be able to assure respondents that they will not be required to provide another agency with answers necessarily identical to those given to the Census Bureau.[83]

The CPR survey, by presenting a question essentially identical to the Census inquiry with respect to value of shipments, does not "demand an answer by definition identical with that furnished the Census Bureau."[84] Simply put, the corporation is under no compulsion to supply the FTC with the same answer reported to Census, although it is certainly at liberty to do so.[85] While some corporations may use their census figures directly in responding to the CPR questionnaire, other corporations, by their own affidavits, have indicated that the unreviewed answers to the census inquiry are not sufficiently reliable for the certification of truthfulness required of their answers to the Federal Trade Commis[701]sion.[86] These latter appellants would not be inhibited in any respect from amending their census responses so as to effect full and well-considered compliance with the demands of the CPR program. It follows, then, that by merely including in the Corporate Patterns Report form a question similar to the inquiry made by the Census Bureau in the Survey of Manufactures, the Commission has not occasioned a breach of the Census Act's rigorous but carefully delineated assurance of confidentiality.

B. *Judicial Enforcement of FTC Informational Report Orders.*

1. The Applicable Standards of Review.

[5, 6] Section 9 of the Federal Trade Commission Act[87] vests jurisdiction in the district courts to command compliance by mandamus, with FTC informational report orders issued pursuant to Section 6(b) of the FTC Act.[88] Prior to commanding compliance with the LB and CPR orders, the District Court reviewed these FTC programs under the criteria and summary procedures applicable to judicial enforcement of compulsory process by administrative agencies set forth by the Supreme Court in *United States* v. *Morton Salt Co.*,[89] and by this court in *FTC* v. *Texaco, Inc.*[90] Appellants contend that a higher standard of review and a plenary review preceding was required on the theory that the LB and CPR programs are "agency action" subject to the arbitrary and capricious standard of Section 706(2) of the Administrative Procedure Act.[91] We reject this argu-

ment because in our view the limited scope of review found by the Supreme Court and this court to be appropriate for compulsory process enforcement is applicable to enforcement of the Section 6(b) report orders being enforced in this proceeding.

In *United States* v. *Morton Salt Co.*[92] the Supreme Court reviewed Federal Trade Commission orders requiring salt producers to file informational reports designed to determine whether these corporations were complying with a court order to cease and [702] desist certain unfair trade practices. These FTC orders were issued pursuant to Section 6(b) of the Federal Trade Commission Act, the same authority invoked by the Commission here. Appellants, nevertheless, would have us find *Morton Salt* inapposite because the report orders in *Morton Salt* were part of a focused FTC investigation, whereas the LB and CPR orders are incident to general statistical surveys. The FTC's authority to require reports under Section 6(b) is not limited to pursuing a focused theory of unlawful activity. The Supreme Court in *Morton Salt* discussed the nature and scope of this authority in some detail.

> The only power that is involved here is the power to get information from those who best can give it and who are most interested in not doing so. Because judicial power is reluctant if not unable to summon evidence until it is shown to be relevant to issues in litigation, it does not follow that an administrative agency charged with seeing that the laws are enforced may not have and exercise powers of original inquiry. It has a power of inquisition, if one chooses to call it that, which is not derived from the judicial function. It is more analogous to the Grand Jury, which does not depend on a case or controversy for power to get evidence but can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not.[93]

The Court went on to state that the purpose of the investigation may be nothing more than to satisfy "official curiosity," because "law enforcing agencies have a legitimate right to satisfy themselves that corporate behavior is consistent with the law and the public interest."[94] Indeed, as we noted in *FTC* v. *Texaco, Inc.*, the investigative power of the Commission may be used to reveal the need for changes in the law for the purpose of making recommendations to Congress.[95] The Commission's purpose in conducting the LB and CPR surveys falls clearly within the purview of its broad investigative powers under Section 6(b). The objective of the Line of Business program is described in the following Commission statement:

> [T]he Federal Trade Commission has made a vigorous effort in recent years to improve the effectiveness of its law enforcement resources allocations for antitrust and consumer protection. One consequence has been a shift toward investigations and

cases which are industrywide in scope. To choose as wisely as possible which industry-wide investigations best serve the public interest, accurate industry-by-industry performance information is needed. The Commission's efforts in this respect have been hampered by the decline over time in the quality of the information available. The Line of Business program was conceived to help fill those information needs.[96]

Similarly, the Commission states that the CPR data banks will be used for "enforcement efforts, economic studies, and policy planning activities."[97] Thus, as to both programs, the FTC seeks to establish data banks for use in targeting areas for investigating and enforcement efforts.

Although the investigative powers of the regulatory agencies are broad, they are not unlimited, and are subject to judicial review "[t]o protect against mistaken or arbitrary orders."[98] As we stated in *Texaco*, however, "while the court's function is 'neither minor nor ministerial,' *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. at 217 n.57, 66 S.Ct. 494, 90 L.Ed. 614, the scope of issues which may be litigated in an enforce[703]ment proceeding must be narrow, because of the important governmental interest in the expeditious investigation of possible unlawful activity."[99] The agency's investigative order, whether it is a subpoena or an information-report order, must be enforced if it does not transcend the agency's investigatory power, the demand is not unduly burdensome or too indefinite, and the information sought is reasonably relevant.

2. The Relevance and Burdensomeness Determinations.

The corporate appellants argue that if the FTC report orders are summarily enforceable as ordinary compulsory process, as we have concluded they are, the District Court erred in evaluating the relevance and burdensomeness of the Line of Business orders.[100] We understand appellants to make three claims. First, that the District Court failed to determine that the LB data sought was relevant to the agency's general purpose as required by *Texaco*. Second, that it was error for the District Court to decide the question of burdensomeness on the basis of five corporate affidavits and the testimony of two corporate witnesses. And finally, that the Court erred in considering relevance and burdensomeness independently.

[7] As recognized in *Texaco*, relevance is to be measured against the agency's general purpose in gathering the investigative material.[101] The District Court found that "the record in this action provides an ample basis for drawing the limited conclusion, without further

evidentiary hearing, that the data sought in the LB program is not totally useless. . . ."[102] If anything, the District Court was too guarded in its assessment of the relevance of the LB data. Indeed, in our view, the record reflects that the Line of Business data sought is reasonably relevant to the Commission's general purpose of collecting corporate financial information in order to assess industry-by-industry performance and market structure.[103] As we are assured that the FTC surveys satisfy this degree of relevance, we need not decide if a lesser standard would suffice.

[8, 9] The next question is whether the District Court abused its discretion in determining that the Line of Business reporting requirements do not impose an undue burden on the respondent corporations.[104] As we indicated in *Texaco,* the onus of demonstrating that a request is unduly burdensome is the corporation's.[105] When the inquiry is conducted pursuant to a lawful purpose and the request is relevant to that objective, its reasonableness will be presumed absent a showing that compliance threatens to disrupt or unduly hinder the normal operations of a business.[106] Concerned that the administrative record was insufficient to permit resolution of the question of burdensomeness, and in view of the corporations' representations that they might lay an adequate evidentiary founda[704]tion with financial presentations from a "small number" of their group, the District Court invited the corporate parties to submit five affidavits on the cost of compliance with each of the two reporting programs.[107] In addition, a hearing was held at which all of the affiants were summoned to present oral testimony.[108] The District Court concluded that, assuming the accuracy of the most extravagant cost estimates, the costs of compliance were *de minimis* relative to the overall corporate operating budgets.[109] We think that under the circumstances appellants were extended ample opportunity to establish their claims of burdensomeness, and we are unable to perceive any error in the District Court's assessment of the inadequacy of their showing in that regard.

[10] Finally, appellants have failed to persuade us that the District Court erred in its refusal to disregard the long and consistent line of authority supporting independent consideration of relevance and burdensomeness.[110]

3. Enforcement Procedures.

[11] The corporations further argue that enforcement of the FTC's report orders by summary mandamus procedures violates Federal Rules of Civil Procedure 81(a)(3) and 81(b), which, they contend, require full compliance with the federal rules, including commencement

of suit by the filing of a complaint and the issuance of a summons in a plenary proceeding.[111]

[12] Rule 81(b) abolishes the writ of mandamus and provides that relief in the nature of mandamus may be obtained "by appropriate action or by appropriate motion."[112] It is clear that the substitution of motion and action practice for writ practice has not abolished the remedy of mandamus.[113] Appellants contend, however, that Rule 81(a)(3),[114] which permits district courts to deviate from the rules in subpoena [705] enforcement cases, compels by implication full application of the rules in other types of mandamus proceedings. The Notes of the Advisory Committee belie appellants' suggestion that this rule was intended to create only a narrow exception to the comprehensive application of the rules in mandamus proceedings. The Committee stated that "although the provision allows full recognition of the fact that the rigid application of the rules in the proceedings themselves may conflict with the summary determination desired [citations omitted], it is drawn so as to permit application whenever the district court deems them useful."[115] Moreover, the decided cases are contrary to appellants' position. The District Court[116] in rejecting the corporations' argument followed the line of decisions in this jurisdiction[117] endorsing the position first delineated in *United States* v. *Associated Merchandising Corp.*:

> As a general rule, district courts do not issue directions in the nature of mandamus except in aid of jurisdiction already acquired. . . . However, where the Court was able to discover a congressional authorization for use of a writ of mandamus, it approved the issuance upon a petition of a peremptory writ. [citations omitted] By [Section 9 of the FTC Act], Congress has expressly conferred jurisdiction to issue a writ of mandamus. Therefore, it seems clear that Congress has expressly authorized the court to proceed summarily to enforce orders of the Federal Trade Commission for the production of documents.[118]

We find the very thin thread of logic offered by appellants insufficient to support their argument that summary mandamus enforcement proceedings for FTC report orders is prohibited by unyielding adherence to the Federal Rules of Civil Procedure.

4. Confidentiality Claims.

[13] Appellants ask to be excused from complying with the LB and CPR orders because of potential jeopardy to confidential information sought by the Commission if LB and CPR data or data aggregates are published.[119] The District Court held that appellants' confidentiality claims are premature prior to a final Commission decision to publish the data from these surveys and are improperly presented to

the Court prior to exhaustion of administrative remedies.[120] Moreover, as noted by the District Court, even if appellants' claims were meritorious, they would not excuse compliance with the Commission order to supply information to the agency.[121] To ensure efficacious assertion of future claims with respect to the release of CPR data, the District Court issued a protective order obligating the FTC to provide ten days notice to companies prior to publication of CPR data for which confidential treatment had been requested and denied.[122] No protective order was issued with regard to the Line of Business data. We uphold the District Court in all respects.

[706] Relying on the Supreme Court's opinion in *FTC* v. *Schreiber*,[123] this court stated recently in *FTC* v. *Texaco, Inc.* that "it is the agencies, not the courts, which should, in the first instance, establish the procedures for safeguarding confidentiality."[124] In light of this principle, we noted as a general rule that until the subpoenaed information has been tendered to the agency and it has had the opportunity to rule on specific requests for confidential treatment, broad protective orders are "premature and improper."[125]

Appellants contend that if the Commission decides to publish aggregate Line of Business statistics that these figures may be subject to disaggregation, thereby revealing confidential individual company data. This argument is premature and improper for several reasons. First, the Commission has already promulgated regulations to ensure the confidential treatment of the 1974 Line of Business information.[126] They provide, in part, that the LB data shall be used only to compile statistical reports.[127] In addition, the FTC is required by its regulations to compile these reports in a fashion that precludes identification of individual company data.[128] The regulations further direct the Commission to develop procedures sufficient to prevent improper disclosure of LB data supplied by a particular reporting company.[129] Appellants assertion that their individual LB data will be identifiable if LB aggregates are made public assumes that the FTC will forsake its own regulations. We reject this contention as contrary to the well-established presumption of administrative regularity.

Second, the Commission has invited reporting companies to lodge with their LB reports special requests indicating why their reported data may be especially vulnerable to identification if included in published aggregates.[130] Appellants must first exhaust their administrative avenues for relief before resorting to the courts for their remedy.[131] In light of the numerous administrative safeguards and avenues for relief, we conclude that a protective order is unnecessary and was properly denied by the District Court with respect to the Line of Business program.

[14] In the CPR appeal, appellants contend that the CPR data constitutes "trade secrets" barred from publication by Section 6(f) of the FTC Act.[132] The District Court properly concluded that it was premature to reach the merits of appellants' trade secret claim because the Commission has made no final decision to publish individual CPR data.[133] Furthermore, as with the claims of confidentiality of the LB data, appellants [707] may demonstrate to the FTC that their CPR data requires special protection and upon receipt of the CPR data, the Commission may rule favorably on particular pleas for confidential treatment. Since the CPR appellants' claims involve the potential release of their individual company data, the District Court decided that a protective order was appropriate "[i]n order to protect the corporate parties from any precipitous action on the part of the FTC" before appellants could exhaust their administrative remedies.[134] The District Court's order—much like the one issued by this court in *Texaco*[135]—requires the Commission to furnish ten days notice of a decision to publish individual company data.[136] Although we stated expressly in *Texaco* that such an order is not required as a general rule, we think the District Court's issuance of a protective order under the circusmstances at bar was well within its discretion.[137] In sum, the trial court's disposition of the CPR appellants' trade secrets claim was unimpeachable in all respects.

5. Claims of the Adjudicative Appellants.

[15] Nine of the appellant corporations who are respondents in adjudicative proceedings styled *In the Matter of Exxon Corporation, et al.* and *In the Matter of Kellogg Co., et al.*[138] (hereinafter, adjudicative appellants or adjudicative corporations) raise separate claims of error with respect to the possible use of the LB and CPR data by the Commission's complaint counsel in those proceedings. The corporations' underlying assertion is that complaint counsel might obtain the LB and CPR data for use in the adjudications without complying with the Commission's discovery procedures, thereby violating appellants' rights under the due process clause, the Administrative Procedure Act and the Commission's own rules of practice. Essentially the same claim was made by one of the adjudicative appellants, Atlantic Richfield, in a case recently before this court, *FTC* v. *Atlantic Richfield Company.*[139] This court, concluding that there was no clear Commission determination of whether FTC rules of practice permitted access by Commission prosecutors to investigatory materials outside the discovery process, remanded the case with instructions to the Commission to interpret its own rules in the first instance.[140] The Commission on June 2, 1978, completed its task and

concluded that its rules for adjudicative proceedings do not prevent access by complaint counsel to documents and information otherwise properly [708] obtained by the Commission without leave of the Administrative Law Judge in charge of the adjudication and without notice to the adjudicative respondent.[141]

Adjudicative appellants contend that the LB and CPR orders should not be enforced as to them because of the potential for allegedly unlawful use of the LB and CPR data in the adjudicative proceedings. We agree fully with the District Court that these claims do not go to the question of enforcement because "the potential jeopardy of procedural rights in the adjudicative proceedings cannot impinge upon the FTC's right to collect the information in question, only upon the use to which the information might be put."[142] The claims presented by the adjudicative appellants relate not to their rights with respect to the Line of Business and Corporate Patterns Report surveys but rather to claimed rights in the adjudicative proceedings currently pending at the FTC. These assertions must be made first in those administrative proceedings and then pursued, if necessary, in the administrative and judicial avenues of appeal. As this court has stated clearly in *Atlantic Richfield:*

> Subsequent to the Commission's interpretation of its rules, all the legal questions which Atlantic wishes to raise will be comprehended within the *Exxon* adjudicatory proceeding, and dealt with by the Administrative Law Judge . . ..
>
> If Atlantic is dissatisfied with the Commission's construction of its rules, Atlantic can raise these claims in the context of an appeal from the final decision of the agency in the adjudicative proceeding.[143]

The present litigation is no more appropriately suited to resolution of any claims that the corporations may wish to raise with respect to the Commission's interpretation of its rules than were the proceedings in *Atlantic Richfield.* Raising these issues at this juncture is improper and, accordingly, we affirm the District Court's order.

C. *The Comptroller General's Review.*

Appellants' final allegation of error is that the Comptroller General's approval of the Line of Business form[144] was defective because it was premised on a misunderstanding of the criteria for review established by Section 3512 of the Federal Reports Act.[145] This statute requires the independent regulatory agencies to submit proposals for the collection of information from ten or more persons to the Comptroller, who must review the form and advise the agency within 45 days whether it satisfies the requirements of the Federal Reports Act.

[709] [16] The Comptroller construes Section 3512 of the Federal Reports Act as establishing two criteria for review of data-collection

plans. These two criteria are set forth in Section 3512(b), which states:

> In carrying out the policy of this section, the Comptroller General shall review all existing information gathering practices of independent regulatory agencies as well as requests for additional information with a view toward—
>
> (1) avoiding duplication of effort by independent regulatory agencies, and
>
> (2) minimizing the compliance burden on business enterprises and other persons.[146]

In approving the LB form, the Comptroller specifically found that the information sought was not available to the FTC from another federal source and that the Commission had sufficiently minimized the respondents' burden of compliance with the reporting requirement.[147]

[17] Appellants argue that the Comptroller was obliged to determine additionally that the data sought was "appropriate" to the FTC's expressed need. This third criterion of review, appellants contend, is imposed implicitly by Section 3512(d) of the Federal Reports Act, which states:

> While the Comptroller General shall determine the availability from other Federal sources of the information sought and *the appropriateness of the forms for the collection of such information*, the independent regulatory agency shall make the final determination as to the necessity of the information in carrying out its statutory responsibilities and whether to collect such information. (emphasis added)[148]

The determination of appropriateness in this context, appellants suggest, should entail a substantive evaluation of the requested data to establish that it meets "some minimum standard of meaningfulness and reliability in terms of the agency's stated need."[149] We find appellants' argument at odds with both the language and the legislative history of Section 3512 of the Federal Reports Act.

Section 3512 was added to the Federal Reports Act in 1973 to create a special review procedure for the data-collection [710] plans of the federal regulatory agencies.[150] Prior to the 1973 amendment, the regulatory agencies were subject to the clearance authority of the Office of Management and Budget (OMB), which continues to serve this function *vis-a-vis* nonregulatory agencies.[151] Congress' express purpose in establishing a different review process for the regulatory agencies was

> to insure that the existing clearance procedure for questionnaires or requests for data does not become, inadvertently or otherwise, a device for delaying or obstructing the investigations and data collection necessary to carry out the important regulatory functions assigned to the independent agencies by the Congress.[152]

Prior to the 1973 amendment, the OMB possessed authority to undertake a substantive appraisal of the data that a regulatory agency sought and to bar collection upon a finding that the data were not necessary for effectuation of the agency's function or the particular program's purpose.[153] Congress regarded the evaluation of the regulatory agency's need for data as essentially a policy determination and considered the reviewing agency's veto power as a source of interference with the independence of the regulatory agencies.[154] So in creating a separate clearance procedure for these agencies, Congress specifically provided in Section 3512(d) that "the independent regulatory agency shall make the final determination as to the necessity of the information in carrying out its statutory responsibilities and whether to collect such information."[155] Appellants' construction of "appropriateness" as a requirement that the Comptroller evaluate the data sought in terms of the agency's need is untenable in light of this provision reserving for the agency the determination as to the necessity of the information in carrying out its statutory responsibilities.[156] We therefore agree with the District Court[157] and the Comptroller General that the term "appropriateness" serves as merely a shorthand reference to the requirement of Section 3512(b)[158] that the Comptroller inspect the regulatory agency's information-gathering proposal with a view toward minimizing the compliance burden.[159] [711]

III. CONCLUSION

The judgment of the District Court is affirmed. The corporate parties shall comply with the Line of Business and Corporate Patterns Report orders as issued by the Federal Trade Commission within 30 days of the date of this opinion.

So ordered.

FOOTNOTES

[1] Multiple enforcement actions were brought by the Commission against companies who failed to comply with the 1974 LB and 1972 CPR orders. The actions relating to the two surveys were assigned to Judge Flannery who consolidated them into two dockets, *In re FTC Line of Business Report Litigations*, Master File Misc. No. 76-127 and *In re Corporate Patterns Report Litigations*, Master File Misc. No. 76-126. By order dated July 30, 1976 Judge Flannery established procedures for his tandem consideration of the two programs. (LB App. 162-186) In a series of opinions and orders the District Court addressed the numerous issues raised by the parties. *In re FTC Corporate Patterns Report Litigations*, 432 F.Supp. 274 (D.C. 1977) (LB App. 187); 432 F.Supp. 291 (1977)(LB App. 211); 1977-2 Trade Cas. 72,-141 (July 11, 1977)(LB App. 239); (unreported Final Order and Judgments)(July 15, 1977) (LB App. 271; CPR App. 248); 1977-2 Trade Cas. 72,420 (July 29, 1977) (denying motion to amend).

Pursuant to the final order and judgment of the District Court entered July 15, 1977, the corporate parties were required to file their Line of Business reports within 150 days of the date of the order and the Corporate Patterns Reports within 90 days. A motion for stay of the enforcement order pending appeal was denied by the District Court on July 22, 1977 (LB App. 273) and by this court on October 21, 1977 (LB App. 274). Petition was made to the Supreme Court for a stay pending appeal in this court of the Corporate Patterns Report orders. Justice Brennan granted the petition on November 11, 1977 (CPR App. 253). Following several extensions of the compliance date in the Line of Business program, we issued an order on April 26, 1978 staying enforcement of the LB orders pending our further consideration of the matter.

[2] 15 U.S.C. § 46(b) (1976) states that the Commission shall have the power

> To require, by general or special orders, persons, partnerships, and corporations, engaged in or whose business affects commerce, excepting banks and common carriers subject to the Act to regulate commerce, or any class of them, or any of them, respectively, to file with the Commission in such form as the Commission may prescribe annual or special, or both annual and special, reports or answers in writing to specific questions, furnishing to the Commission such information as it may require as to the organization, business, conduct, practices, management, and relation to other corporations, partnerships, and individuals of the respective persons, partnerships, and corporations filing such reports or answers in writing. Such reports and answers shall be made under oath, or otherwise, as the Commission may prescribe, and shall be filed with the Commission within such reasonable period as the Commission may prescribe, unless additional time be granted in any case by the Commission.

[3] A more limited Line of Business survey was conducted for 1973. The LB form served on 345 companies in the 1973 survey differed from the 1974 form. See Bureau of Economics Staff Memorandum, 1974 Form LB Revision (LB App. 782). Numerous motions to quash the 1973 orders were denied by the Commission. Preenforcement actions seeking to enjoin the 1973 survey were commenced in the District Courts of Delaware and the Southern District of New York. *Aluminum Co. of America* v. *FTC*, 390 F.Supp. 301 (S.D.N.Y. 1975) (LB App. 89); *A. O. Smith Corp.* v. *FTC*, 396 F.Supp. 1108, 1125 (D.Del.1975) (LB App. 55), *rev'd* 530 F.2d 515 (3d Cir. 1976) (LB App. 121); *A. O. Smith Corp.* v. *FTC*, 417 F.Supp. 1068 (D.Del. 1976) (LB App. 196), 403 F.Supp. 1000 (D.Del. 1975) (LB App. 100). The Commission commenced an enforcement action in New York, *FTC* v. *American Standard, Inc.*, Civ.No. M18-304 (S.D.N.Y. Feb. 11, 1975), but later decided to abandon enforcement of the 1973 orders when it instituted proceedings to enforce the 1974 LB and the 1972 CPR orders in the District Court for the District of Columbia. The preenforcement actions in New York and Delaware, to which claims regarding the 1974 LB and the 1972 CPR surveys had been added, were transferred to the District of Columbia. *A. O. Smith Corp.* v. *FTC*, 417 F.Supp. 1068, 1085-1091 (D.Del.1976) (LB App. 153-159).

Orders requiring reports for the 1975-1976 Line of Business survey have been served on 481 companies but the FTC has not instituted enforcement proceedings (LB App. 957).

[4] FTC Form LB (LB App. 735). See Instructions, Form LB, General (LB App. 748).

[5] The FTC has developed, based on the Office of Management and Budget's Standard Industrial Classification system, 260 four-digit codes which define manufacturing market categories (LB App. 765).

[6] Federal Trade Commission, Annual Line of Business Report Program, Statement of Purpose (LB App. 308) (hereinafter cited as LB Statement of Purpose); Supporting Statement, FTC Form LB, 1974 Survey Version, Federal Trade Commission (July 1, 1975) (LB App. 715) (hereinafter cited as LB Supporting Statement).

[7] LB Supporting Statement, *supra* note 6, at 4 (LB App. 719).

[8] *Supra* note 6.

[9] The 1973 LB form was the subject of public hearings by the Office of Management and Budget (see Minutes, LB App. 2601), and notice and comment review by the Comptroller General (see Report to the Comptroller General of the United States on the Evaluation of the Federal Trade Commission's Proposed Annual Line of Business Report, May 10, 1974, at 3, LB App. 403).

[10] 40 Fed.Reg. 17081 (April 16, 1975).

[11] Letter from William F. Long, Manager, Line of Business Program (April 15, 1975) (LB App. 2297); LB Supporting Statement, *supra* note 6, at 9—10 (LB App. 723-724).

[12] Transcript of Public Hearing on Proposed FTC Form LB for Use in Collecting 1974 Line of Business (May 20, 1975) (LB App. 1435).

Footnotes (con't)

[13] Letters from Virginia M. Harding, Acting Secretary of the FTC, to Elmer B. Staats, Comptroller General of the United States (July 1, 1975) (LB App. 2025).

[14] 40 Fed.Reg. 28677 (July 8, 1975).

[15] Letter from Monte Canfield, Jr., Director, General Accounting Office, to FTC Chairman Lewis A. Engman (August 18, 1975) (LB App. 798).

[16] Order to File Special Report, 1974 Form LB (August 20, 1975) (LB App. 804).

[17] *E. g.*, Joint Motion to Quash Orders to File Special Reports and for Other Appropriate Relief filed September 2, 1975, on behalf of A. O. Smith Corp., *et al.* (LB App. 853); Motion of C.I.T. Financial Corporation to Quash Order to File Special Report and Memorandum in support thereof, filed September 22, 1975 (LB App. 2421). For a list of companies which filed motions to quash, see Appendix I to FTC; Petition for Enforcement, "Motions to Quash LB Orders Filed with the Federal Trade Commission by Respondents" (LB App. 2547).

[18] Statement of the Commission on Motions to Quash the Orders to File the 1974 Line of Business Form (LB App. 878).

[19] Corporate Patterns Report for 1972, FTC Form CPR-1 (CPR App. 305), FTC Form CPR-2 (CPR App. 318), FTC Form CPR-S (CPR App. 322); Supporting Statement for the Federal Trade Commission's Corporate Patterns Report (Dec. 31, 1974) (CPR App. 256) (hereinafter cited as CPR Supporting Statement).

[20] *Supra* note 19.

[21] CPR Supporting Statement, *supra* note 19, at 2 (CPR App. 257).

[22] *Id.* at 4 (CPR App. 259).

[23] See FTC CPR Brief at 9.

[24] Supplemental Statement for the Federal Trade Commission's Corporate Patterns Report (December 23, 1974) at 12-13 (CPR App. 267-268).

[25] 40 Fed.Reg. 4689 (Dec. 31, 1975).

[26] Letter from Monte Canfield, Jr., Director of GAO, to FTC Chairman Engman (March 24, 1975) (CPR App. 778).

[27] Meeting Notes (June 12, 1975) (CPR App. 984).

[28] FTC Resolution Authorizing and Directing the Collection of Economics Reports (July 29, 1975) (CPR App. 299).

[29] See FTC Order to File Special Report addressed to Allen-Bradley Co. (July 29, 1975) (CPR App. 304).

[30] FTC CPR Brief at 11.

[31] Statement of the Commission, Motions to Quash, Corporate Patterns Special Report (CPR App. 455).

[32] See note 1, *supra*.

[33] See discussion in text *infra* at notes 37-55.

[34] See discussion in text *infra* at notes 56-86.

[35] See discussion in text *infra* at notes 89-143.

[36] See discussion in text *infra* at notes 144-159.

[37] 15 U.S.C. §§ 41 *et seq.* (1976).

[38] *Id.* § 46(b).

[39] During oral argument, counsel for appellants stated that the corporations were not "faulting with the power" of the Commission to conduct the Line of Business and Corporate Patterns Report surveys, but rather challenging only the alleged "procedural unfairness" of the way in which the Commission has exercised its authority.

[40] 5 U..S.C. § 553 (1976).

[41] *Supra* note 38.

[42] 15 U.S.C. § 46(g) (1976) provides that the Commission shall have power "to make rules and regulations for the purpose of carrying out the provisions of section 41 to 46 and 47 to 58 of this title."

[43] See *National Petroleum Refiners Ass'n* v. *FTC*, 157 U.S.App.D.C. 83, 88, 482 F.2d 672, 677 (1973), *cert. denied*, 415 U.S. 951, 94 S.Ct. 1475, 39 L.Ed.2d 567 (1974).

[44] 15 U.S.C. § 49(a) (1976).

[45] See, *e.g.*, *FTC* v. *Lonning*, 176 U.S.App.D.C. 200, 539 F.2d 202 (1976).

[46] Appellants rely heavily on the fact that the Securities and Exchange Commission and the Federal Power Commission have engaged in rulemaking in the development of information-gathering programs as support for the claim that the Federal Trade Commission should be required to conduct rulemaking proceedings prior to implementation of the LB and CPR programs. In our view, appellants' reliance is misplaced. The statute enabling the SEC to establish reporting requirements is substantially different from the Federal Trade Commission's governing legislation. The statutory provisions empowering the SEC to impose reporting requirements on corporations expressly provide that the SEC may do so only by the promulgation of rules and regulations in accordance with the Administrative Procedure Act. See, *e.g.*, 15 U.S.C. §§ 77s(a), 78m(a) (1976).

The Natural Gas Act authorizes the Federal Power Commission to require natural gas companies to file annual or special reports and, analogously to the FTC Act, does not expressly confine the F.P.C.'s information-gathering authority to the issuance of rules and regulations. Rather, 15 U.S.C. § 717i(a) (1976) provides, in part, that

> [e]very natural-gas company shall file with the Commission such annual and other periodic or special reports as the Commission may by rules and regulations or order prescribe as necessary or appropriate to assist the Commission in the proper administration of this chapter.

Footnotes (con't)

Nonetheless, in a recent exercise of its power to require reporting, the FPC *elected* to conduct rulemaking proceedings in accordance with the requirements of the APA. See *Union Oil Co.* v. *FPC*, 542 F.2d 1036, 1040 (9th Cir. 1976). Thus appellants derive no support from the examples of the SEC and FPC reporting programs.

[47] 5 U.S.C. §§ 551 *et seq.* (1976).

[48] We reject appellants' argument that the LB and CPR programs fall within the APA's definition of a "rule," 5 U.S.C. § 551(4) (1976), and are therefore subject to the APA's rulemaking requirements, *id.* §§ 551(5), 553. The APA defines a "rule" as:

> the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future or rates, wages, corporate or financial structures of reorganizations thereof, prices, facilities, appliances, services, or allowances therefor or of valuation, costs, or accounting, or practices bearing on any of the foregoing.

Id. § 551(4). Appellants make two arguments. First, appellants maintain that since the LB and CPR data will be used for regulatory purposes, the collection of the data itself is a prescription of law or policy within the meaning of the rule definition. We agree with the District Court that appellants' argument proves too much. 432 F.Supp. at 302. If the collection of information is considered a prescription of law or policy because of the possible regulatory uses to which the information may be put, then all types of compulsory process the product of which may be put to regulatory use—including subpoenas—would similarly require rulemaking.

Appellants' second argument, which applies only to the LB program, is that the LB reporting requirements constitute "approval or prescription for the future of . . . valuations, costs, or accounting, or practices bearing on any of the foregoing" within the terms of the APA's rule definition. But as the District Court determined, "the corporate parties can hardly claim that the present orders have prescribed accounting methods, since the present orders seek data from years past . . . ." 432 F.Supp. at 301. Since the LB instructions allow corporations to provide estimates or incomplete information when underlying data is unavailable, the corporations cannot reasonably assert that they are unable to satisfy the LB requirements under their current accounting and recordkeeping systems. Line of Business Form, Instructions, General at 2 (LB App. 749).

Appellants nevertheless contend that the LB program prescribes accounting practices for the future because the "natural and practical results" of the reporting requirements will be transformations of the corporations' accounting and recordkeeping practices. Since many corporations do not maintain financial records on the basis of the market classifications used in the LB program, corporations may decide to alter their future accounting practices to facilitate potentially recurring LB reporting obligations. But any adjustment undertaken by the corporations will be entirely voluntary and not at the express behest of the FTC. To the contrary, the Line of Business Form Instructions state expressly that "reporting corporations need not develop new accounting systems or substantially rework data processing procedures in order to complete the LB Form" *Id.* Moreover, the decisions of any company subject to the LB orders to modify its accounting practices would most likely be based upon the company's prediction that it will be subject to substantially similar LB reporting requirements in future years and that an alteration in accounting methods would significantly ease the burden of compiling and certifying responses. See Evidentiary Hearing Before the District Court for the District of Columbia, June 16 and 17, 1977, Testimony of Howard Siers for Dupont Company, Transcipt at 71 (LB App. 1080); Testimony of John Spellman for Grace Company, Transcript at 346, 361 (LB App. 1320, 1335). Yet the Commision has made no final decision to repeat the LB program in its present form on an annual basis, although it has the authority to do so. In fact, the Commission has indicated that it will reconsider the present market categories on the basis of the data it receives from the first fully-enforced survey and in light of the recently developed market classification guidelines of the Financial Accounting Standards Board. FTC Memorandum dated May 9, 1977, soliciting comments on revision of 1974 LB Form (LB App. 994). Accordingly, we conclude that neither the LB program nor the CPR survey is embraced by the APA's definition of a "rule."

[49] 92 Cong. Rec. 5648 (1948).

[50] 5 U.S.C. § 555(c) (1976).

[51] Our view comports with the Commission's interpretation of the procedural requirements of the Federal Trade Commission Act and the Administrative Procedure Act. The Commission has stated:

> It has been the Commission's long-standing interpretation of the interrelationship of the APA and the FTC Act that the Commission is not required to follow the APA procedures for rulemaking when the Commission decides to use its powers under Section 6, 15 U.S.C. § 46, or other provisions of the FTC Act, to gather information or to investigate.

Statement of the Commission on Motions to Quash the Orders to File the Line of Business Form at 11 (December 19, 1975) (LB App. 888). Deference is due an agency's interpretation of its own mandate and, to a lesser extent, to its interpretation of the Administrative Procedure Act. *International Telephone & Telegraph Corp.* v. *Local 134, International Brotherhood of Electrical Workers*, 419 U.S. 428, 441, 95 S.Ct. 600, 609, 42 L.Ed.2d 558, 569 (1975).

[52] 111 U.S.App.D.C. 160, 295 F.2d 147 (1961).

[53] 533 F.2d 276 (5th Cir. 1976).

[54] *Id.* at 278.

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[55] Appellant corporations contend, nonetheless, that the Commission developed the Line of Business and Corporate Patterns Report programs "behind closed doors" and in contravention of sound public policy. Appellants' characterization of the FTC's procedure finds no support in the record. The Commission provided substantial opportunity for public input and made a conscientious effort to be responsive to the numerous comments, complaints and criticisms proffered by corporations, experts and other branches of the government. Although the corporations have not always approved of the Commission's resolution of their objections to the Line of Business and Corporate Patterns Report surveys, appellants' claim that they have been denied an opportunity to present their views to the Commission is, in our view, untenable. In any event, the Commission exercised its discretion to permit greater procedural access to the decision-making process involved in developing the LB and CPR programs than was required. See *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 524, 98 S.Ct. 1197, 1202, 55 L.Ed.2d 460, 467 (Sup.Ct. April 3, 1977).

[56] 13 U.S.C. §§ 1 *et seq.* (1976).

[57] *Id.* § 9(a)(3).

[58] Appellants seek to extend the Census Act's protection to "statistical information specially prepared for and submitted to the Census Bureau" that is "not prepared or maintained in the ordinary course of business." Joint Appellants' CPR brief at 15-16.

[59] See note 63 *infra.*

[60] "Value of shipments" is defined by the Census Bureau and the FTC as "the value of products shipped for sale or transfer to other plants of the company which were manufactured, fabricated, processed or assembled" by the company. Census Instructions for completing the Annual Survey of Manufactures Report, 1973 at 7 (CPR App. 386); FTC Reference List for use in completing the Federal Trade Commission Corporate Patterns Report at 7-8 (CPR App. 333-334).

[61] *Compare* Item 9 of Census Form MA-100 (1973) (CPR App. 381), *with* Item 5 of *FTC* Form CPR-1, Corporate Patterns Report for 1972 (CPR App. 305).

The product-class codes utilized in the CPR survey are the five-digit codes developed by the Census Bureau in 1972 based on the Standard Industrial Classification system. Census of Manufactures: 1972 Numerical List of Manufactured Products (New (1977) SIC Basis). Series MC 72-1-12. The Annual Census of Manufactures for 1972 required reporting on the basis of product-class codes developed by the Census Bureau in 1967. Prior to publication of the 1972 data, however, the Census Bureau converted the survey results into the 1972 code classifications. The Census form for the Annual Survey of Manufactures for 1973 was sent to companies with each company's value of shipments for 1972 converted into the 1972 code classifications.

[62] FTC Resolution Authorizing and Directing the Collection of Economic Reports (Dec. 17, 1974) (CPR App. 254). See Comments prepared by Commission's Bureau of Economics staff on questions raised by staff of the General Accounting Office and discussed at meeting of March 11, 1975 (March 19, 1975) at 2 (CPR App. 283).

[63] FTC CPR Brief at 29. The inquiries are not identical in several respects. The CPR survey requires reporting in terms of the Census Bureau's revised 1972 product codes, whereas reporting for the Annual Survey of Manufactures for 1972 was done in terms of the 1968 codes. See note 61 *supra.* Second, the CPR survey requires total company value-of-shipments data, whereas the Census Bureau required reporting by individual establishment (plant). Finally, the CPR form requires a certification of accuracy and permits the use of estimates only where the underlying data is unavailable. (CPR App. 305). The census form permits the use of approximations and estimates which are "substantially accurate" (CPR App. 692).

[64] 13 U.S.C. § 9(a)(3) (1976).

[65] *Id.*

[66] "[W]here the language of an enactment is clear and construction according to its terms does not lead to absurd or impracticable consequences, the words employed are to be taken as the final expression of the meaning intended. And in such cases legislative history may not be used to support a construction that adds to or takes from the significance of the words employed. But the reasons for and the significant circumstances leading up to the enactment may be noticed in confirmation of the meaning conveyed by the words used." (citations omitted) *United States* v. *Missouri Pac. R.R. Co.*, 278 U.S. 269, 278, 49 S.Ct. 133, 136, 73 L.Ed. 322, 376 (1929). See also *Cass* v. *United States*, 417 U.S. 72, 76-79, 94 S.Ct. 2167, 2169-2171, 40 L.Ed.2d 668, 672-674 (1974); *United States* v. *Oregon*, 366 U.S. 643, 648, 81 S.Ct. 1278, 1281, 6 L.Ed.2d 575, 579 (1961); *Caminetti* v. *United States*, 242 U.S. 470, 484, 37 S.Ct. 192, 194, 61 L.Ed. 442, 452 (1917); *March* v. *United States*, 165 U.S.App. D.C. 267, 274-275, 506 F.2d 1306, 1313-1314 (1974); see generally 2A C. D. Sands, Sutherland Statutes and Statutory Construction, (4th ed. 1973) ch. 46, pp. 48-68; Murphy, *Old Maxims Never Die: the "Plain-Meaning Rule" and Statutory Interpretation in the "Modern" Federal Courts*, 75 Col.L.Rev. 1299 (1975).

[67] Pub.L. No. 87-813, 76 Stat. 922 (1962).

[68] 368 U.S. 208, 82 S.Ct. 289, 7 L.Ed.2d 240 (1961).

[69] Prior to the 1962 amendment, the confidentiality provision of the Census Act stated:

> (a) Neither the Secretary, nor any other officer or employee of the Department of Commerce or bureau or agency thereof, may, except as provided in section 8 of this title—(1) use the information furnished under the provisions of this title for any purpose other than the statistical purposes for which it is supplied, or

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(2) make any publication whereby the data furnished by any particular establishment or individual under this title can be identified; or

(3) permit anyone other than the sworn officers and employees of the Department or bureau or agency thereof to examine the individual reports. 68 Stat. 1013 (1954).

[70] The decisions interpreting the scope of the Census Act's confidentiality protection prior to 1962 consistently held that the *actual forms* submitted to the Census Bureau were protected from disclosure. *United States* v. *Bethlehem Steel Corp.*, 21 F.R.D. 568 (S.D.N.Y. 1958) (Census prohibited from releasing to antitrust defendant reports filed by competitors); *Federal Trade Commission* v. *Orton*, 175 F.Supp. 77 (S.D.N.Y. 1959) (FTC barred from subpoenaing schedules filed with Census Bureau).

The scope of the confidentiality provisions of the unamended Census Act in protecting the *copies* of the census form retained in the corporate files was the subject of disagreement among the federal courts. The Seventh Circuit in *FTC* v. *Dilger*, 276 F.2d 739 (7th Cir.), *cert. denied*, 364 U.S. 882, 81 S.Ct. 171, 5 L.Ed.2d 104 (1960), held that the retained copies did come within the purview of the Act. The Second Circuit, however, held that the company was not required to retain a copy of their filed report and that the retained file copies were therefore not secure from compelled disclosure. *St. Regis Paper Co.* v. *United States*, 285 F.2d 607 (2d Cir. 1960), *aff'd*, 368 U.S. 208, 82 S.Ct. 289, 7 L.Ed.2d 240 (1961).

[71] *St. Regis Paper Co.* v. *United States*, *supra* note 70, 368 U.S. at 216, 82 S.Ct. at 294, 7 L.Ed.2d at 247.

[72] *Id.* at 218, 82 S.Ct. at 295, 7 L.Ed.2d at 248.

[73] S.Rep.No.2218, 87th Cong., 2d Sess. (1962) (hereinafter cited as Senate Report) (CPR App. 657), U.S. Code Cong. & Admin.News 1962, p. 3188.

[74] H.R.Rep.No.2437, 87th Cong., 2d Sess. 2 (1962) (hereinafter cited as House Report) (CPR App. 645); Senate Report, *supra* note 73, at 2 (CPR App. 658), U.S.Code Cong. & Admin. News 1962, p. 3189.

[75] Moreover, the express provision of the Census Act requires accommodation of the interest of the federal agencies in gathering information. 13 U.S.C. § 132 (1976), states that "nothing in this title shall be deemed to revoke or impair the authority of any other Federal Agency with respect to the collection or release of information."

[76] House Report, *supra* note 74, at 1 (CPR App. 644).

[77] *Id.*

[78] House Report, *supra* note 74, at 5 (CPR App. 648). See Hearings on Confidentiality of Census Report Before the House Comm. on Post Office and Civil Service, 87th Cong., 2d Sess. (1962) (hereinafter cited as Census Hearings) at 27.

[79] House Report, *supra* note 74, at 7 (CPR App. 650); Senate Report, *supra* note 73, at 4 (CPR App. 660), U.S.Code Cong. & Admin.News 1962, p. 3191. See also Statement of Walter Ryan, Acting Chief, Office of Statistical Standards, Bureau of the Budget, Census Hearings, *supra* note 78, at 15.

[80] See note 72, *supra*.

[81] Letter from Luther H. Hodges, Secretary of Commerce, to Tom Murray, Chairman, Comm. on Post Office and Civil Service, House of Representatives (July 19, 1962); House Report, *supra* note 74, at 6 (CPR App. 649) Senate Report, *supra* note 73, at 3 (CPR App. 659), U.S. Code Cong. & Admin.News 1962, p. 3191.

[82] *Id.*

[83] See Ryan Statement, Census Hearings, *supra* note 78, at 17; Chamber of Commerce Statement, Census Hearings at 3; Federated Department Stores Statement, Census Hearings at 51; National Ass'n of Manufacturers Statement, Census Hearings at 62. See generally Note, *The Required Report Privileges*, 56 Nw.U.L.Rev. 283, 293 (1961).

[84] *Supra* note 79.

[85] See Statement of the Commission, Motions to Quash, Corporate Patterns Special Report at 13 (CPR App. 467); Letter from C. A. Tobin, Secretary to the FTC, "To Whom This May Concern" (Feb. 13, 1976) (CPR App. 335); Hearings on Departments of State, Justice, and Commerce, the Judiciary, and Related Agencies Appropriations for Fiscal Year 1977 Before the Senate Subcomm. on Appropriations, 94th Cong., 2d Sess. (1976) at 142-143 (CPR App. 617-18).

[86] Affidavit of Cargill, Inc. at 4-7 (CPR App. 723-726); Affidavit of Northwest Industries, Inc. at 3 (CPR App. 740); Affidavit of Goodyear Tire & Rubber Co. at 2-3 (CPR App. 733-734).

[87] 15 U.S.C. § 49 (1976), which states, in part, that "the district courts of the United States shall have jurisdiction to issue writs of mandamus commanding any person, partnership, or corporation to comply with the provisions of this subchapter or any order of the Commission made in pursuance thereof."

[88] 15 U.S.C. § 46(b) (1976).

[89] 338 U.S. 632, 70 S.Ct. 357, 94 L.Ed. 401 (1950).

[90] 180 U.S.App.D.C. 390, 555 F.2d 862 (en banc), *cert. denied*, 431 U.S. 974, 97 S.Ct. 2939, 53 L.Ed.2d 1072 (1977). See 432 F.Supp. at 313-316 for the District Court's analysis.

[91] 5 U.S.C. § 706(2) (1976). The District Court solicited supplemental memoranda on the agency action issue, and concluded that the LB and CPR programs are not "agency action" within the meaning of Section 706(2), and even if so considered, are not arbitrary, capricious, an abuse of discretion, or otherwise not in conformance with the standards of this Section. 1977-2 Trade Cas. at 72,143-72,146. As the District Court stated,

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> The Court has a limited role to play, however, in reviewing agency action to determine whether it is arbitrary or capricious. This court cannot merely substitute its judgment for that of the agency. *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 416, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971). Rather, after a searching and careful inquiry, the court should determine whether the decision is based on a consideration of the relevant factors and whether there has been a clear error of judgment.

Id. at 72, 146. We agree with the District Court that the record of the administrative consideration of the LB and CPR programs reflects an extensive consideration of the problems posed by the development of these surveys. In addition, we reject as frivolous appellants' assertion that the District Court's ruling was procedurally deficient because it ruled on appellants' challenge to the composition of the administrative record at the same time it rejected appellants' claim of arbitrary and capricious agency action. Since the District Court rejected appellants' claim that the administrative record was incomplete, there was no change in the composition of the record which could possibly have prejudiced appellants in their ability to present their arguments with respect to the agency action issue.

[92] *Supra* note 89.

[93] *Id.* at 642-643, 70 S.Ct. at 363-364, 94 L.Ed. at 410-411.

[94] *Id.*

[95] 15 U.S.C. § 49 (1976). See *FTC* v. *Texaco, Inc.*, *supra* note 90, 180 U.S.App.D.C. at 403 n.28, 555 F.2d at 875 n.28.

[96] LB Supporting Statement, *supra* note 6, at 2 (LB App. 717).

[97] CPR Supporting Statement, *supra* note 19, at 2 (CPR App. 257).

[98] *United States* v. *Morton Salt Co.*, *supra* note 89, 338, U.S. at 640, 70 S.Ct. at 362-363, 94 L.Ed. at 409.

[99] *Supra* note 90, 180 U.S.App.D.C. at 400, 555 F.2d at 872.

[100] Appellants do not raise this objection in connection with the District Court's enforcement of the Corporate Patterns Report orders.

[101] *Supra* note 90, 180 U.S.App.D.C. at 402, 555 F.2d at 874.

[102] 1977-2 Trade Cas. at 72,146.

[103] The critics of the LB program and the FTC agree that the design of the LB survey and the definition of market categories are not perfectly suited for collecting data that will infallibly reflect market conditions. But we do not hold the FTC to a standard of perfection in assessing the relevance of their effort. The complex problems of designing this type of statistical program have been and will continue to be the focus of extensive efforts by the Commission to improve the survey. In the meantime, it is not disputed that the LB data that the FTC receives will be the only corporate financial performance data available in terms of uniform market categories. We defer to the Commission's expertise in concluding that this information is necessary and useful to performance of its regulatory responsibilities.

[104] See *FTC* v. *Texaco, Inc.*, *supra* note 90, 180 U.S.App.D.C. at 409 & n.45, 555 F.2d at 881 & n.45.

[105] *Id.*

[106] *Id.* at 410, 555 F.2d at 882.

[107] 432 F.Supp. at 315 & n.61. The corporations chose not to file affidavits with respect to the cost of complying with the CPR orders. 1977-2 Trade Cas. at 72,148.

[108] 1977-2 Trade Cas. at 72,148. Although all five affiants were invited to present oral testimony, the corporations elected to present only two.

[109] 1977-2 Trade Cas. at 72,151-72,152 (Findings of Fact ¶ 15).

[110] *E. g.*, *United States* v. *Morton Salt Co.*, *supra* note 89; *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, 66 S.Ct. 494, 90 L.Ed. 614 (1946); *FTC* v. *Texaco, Inc.*, *supra* note 90.

The single statement of the Fifth Circuit in *Genuine Parts Co.* v. *FTC*, 445 F.2d 1382, 1391 (5th Cir. 1971), that the burden of compliance was particularly reasonable in light of the fact that the portion of the order objected to was "the very heart of the inquiry," does not suggest to us a change from the traditional bifurcated analysis.

[111] Appellants have filed a supplemental brief advancing the argument that as a result of the FTC's filing a petition instead of a complaint in the District Court, "the district court never obtained subject matter jurisdiction and its final order granting mandatory relief is a nullity."

Brief by Goodyear Tire, *et al.* at 14. This argument is totally lacking in merit. The Supreme Court has stated:

> We think that so long as the court's subject-matter jurisdiction actually existed and adequately appeared to exist from the papers filed, . . . any defect in the manner in which the action was instituted and processed is not itself jurisdictional and does not prevent entry of a valid judgment. See 2 J. Moore, Federal Practice ¶ 3.06[1], pp. 731-732 (2d ed. 1974). *Schlesinger* v. *Councilman*, 420 U.S. 738, 742 n.5, 95 S.Ct. 1300, 1305 n.5, 43 L.Ed.2d 591, 599 n.5 (1975).

[112] Fed.R.Civ.P. 81(b) states:

> (b) Scire Facias and Mandamus. The writs of scire facias and mandamus are abolished. Relief heretofore available by mandamus or scire facias may be obtained by appropriate action or by appropriate motion under the practice prescribed in these rules.

[113] 7 J. Moore, Federal Practice ¶ 81.07, at 81-96 (2d ed. 1975).

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[114] Fed.R.Civ.P. 81(a)(3) provides, in pertinent part:

> These rules apply to proceedings to compel the giving of testimony or production of documents in accordance with a subpoena issued by an officer or agency of the United States under any statute of the United States except as otherwise provided by statute or by rules of the district court or by order of the court in the proceedings.

[115] See Notes of Advisory Committee on Rules, Fed.R.Civ.P. 81, 28, 28 U.S.C.A. Rule 81 at 30-31 (1960).

[116] 432 F.Supp. at 280-283.

[117] *Emerson Electric Co.* v. *FTC*, Misc. No. 76-0002 (D.D.C. July 21, 1976); *FTC* v. *Jorgensen*, Misc. No. 75-46 (D.D.C. May 16, 1975); *FTC* v. *Sherry*, 1969 Trade Cas. 87,452 (D.D.C. 1969).

[118] 256 F.Supp. 318, 321 (S.D.N.Y. 1966).

[119] 15 U.S.C. § 46(f) (1976) states that the Commission shall have the power

> [t]o make public from time to time such portions of the information obtained by it hereunder, except trade secrets and names of customers, as it shall deem expedient in the public interest; and to make annual and special reports to the Congress and to submit therewith recommendations for additional legislation; and to provide for the publication of its reports and decisions in such form and manner as may be best adapted for public information and use.

[120] 1977-2 Trade Cas. at 72,146 n. 7; 432 F.Supp. at 311-312.

[121] *See Electric Bond Co.* v. *SEC*, 303 U.S. 419, 438, 58 S.Ct. 678, 685, 82 L.Ed. 936, 946 (1938).

[122] July 11, 1977 order (LB App. 269).

[123] 381 U.S. 279, 85 S.Ct. 1459, 14 L.Ed.2d 383 (1965).

[124] *Supra* note 90, 180 U.S.App.D.C. at 412 n. 62, 555 F.2d at 884 n. 62. See also *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51, 58 S.Ct. 459, 463-464, 82 L.Ed. 638, 643-644 (1938).

[125] *FTC* v. *Texaco, Inc.*, *supra* note 90, 180 U.S.App.D.C. at 412, 555 F.2d at 884.

[126] *Id.*

[127] Confidentiality Rules and Procedures for the 1974 Reporting Year, 40 Fed.Reg. 42243 (1975) (LB App. 710).

[128] *Id.*

[129] *Id.* In addition, the publication or release of any data submitted to the FTC is subject to a number of statutes. The FTC Act, 15 U.S.C. § 46(f) (1976), prohibits the Commission from publishing trade secrets obtained in its information-gathering activities. It is a criminal offense for any Commission employee to make public any confidential information obtained by the Commission, 15 U.S.C. § 50 (1976); 18 U.S.C. § 1905 (1976). For discussion of precautions taken to ensure the security of LB data, see Hearings on Appropriations for the Departments of State, Justice and Commerce, the Judiciary, and Related Agencies for 1977 Before a Subcomm. of the Senate Comm. on Appropriations, 94th Cong., 2d Sess., pt. 4, at 128-130 (1976).

[130] Statement of the Commission on Motions to Quash the Orders to file the 1974 Line of Business Form at 10 (LB App. 887); Statement of the Commission (on renewed motions to quash) at 4 (LB App. 558).

[131] See note 124, *supra*.

[132] 15 U.S.C. § 46(f) (1976).

[133] 432 F.Supp. at 311-312.

[134] *Id.* at 312.

[135] 180 U.S.App.D.C. at 412, 555 F.2d at 884.

[136] *Supra* note 130.

[137] 180 U.S.App.D.C. at 412 n. 64, 555 F.2d at 884 n. 64.

Appellants Milliken & Company and Allen-Bradley Company have filed a supplemental brief asserting their special interest in the asserted failure of the Commission and the District Court to protect adequately the confidentiality of the LB and CPR data. These privately-held companies aver the danger of disclosure of their financial data is especially grave because they are not subject to the SEC's reporting requirements applicable to public corporations. While there may be a unique facet to the confidentiality claims of the non-public corporations subject to the FTC surveys, these claims, like the confidentiality claims of the other appellant corporations, are nevertheless premature and without merit in this litigation.

[138] Atlantic Richfield Company, Exxon Corporation, Gulf Oil Corporation, Mobil Oil Corporation, Shell Oil Company, Standard Oil of California, Standard Oil Company (Indiana) and Texaco, Inc. are respondents in *In the Matter of Exxon Corporation, et al.* FTC Docket 8934. General Mills, Inc. is a respondent in *In the Matter of Kellogg Company, et al.*, FTC Docket 8883.

[139] 185 U.S.App.D.C. 229, 567 F.2d 96 (1977).

[140] *Id.* at 239, 567 F.2d at 106.

In *FTC* v. *Atlantic Richfield Co.* this court required sequestration of the investigative documents pending the Commission's interpretation of its rules as required on remand in order to ensure that discovery in the FTC adjudicative proceeding proceed according to the Commission's interpretation of its rules. 567 F.2d at 106-107. Following the issuance of *Atlantic Richfield* on July 25, 1977, the adjudicative corporations moved the District Court to amend its final order and judgment by fashioning a sequestration order similar to the one issued in *Atlantic Richfield*. See 1977-2 Trade Cases 72,420 (D.D.C. July 29, 1977). In response the Commission committed to pre-

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vent access, outside normal discovery process, by complaint counsel to either the LB or CPR reports or to any unpublished aggregate data based on such reports pending the Commission's interpretation of its rules. Letter from Carol M. Thomas, Secretary to the FTC, to Robert G. Jordon, III (July 29, 1977) (LB App. 2781). We agree with the District Court that the FTC's voluntary commitment to sequester the LB and CPR data to the same extent required by this court's order in *Atlantic Richfied* was adequate.

[141] *In the Matter of Subpoena Duces Tecum Addressed to Atlantic Richfield Co., et al.*, FTC Docket No. 741-0019.

[142] 432 F.Supp. at 313. See note 121, *supra*.

[143] *Supra* note 139, 185 U.S.App.D.C. at 240, 567 F.2d at 107.

[144] The Corporate Patterns Report form was submitted to the Comptroller General by the Federal Trade Commission on January 23, 1975. The Comptroller published a notice of the proposed survey in the Federal Register on January 31, 1975, 40 Fed.Reg. 4689, soliciting written comments from all interested parties. In a letter dated March 24, 1975 from Monte Canfield, Jr., Director of the General Accounting Office, to FTC Chairman Lewis A. Engman, the CPR form was cleared for use the the FTC (CPR App. 777). Although the GAO expressed concern about the "meaningfulness" and confidentiality of the CPR data sought, it did not consider these reservations to be a basis for denying clearance under the review provisions of the Federal Reports Act.

The corporate parties raise no objection to the Comptroller's clearance of the CPR form.

[145] 44 U.S.C. § 3512 (Supp. V 1975).

[146] *Id.* § 3512(b). Great weight must be given to an agency's interpretation of its statutory mandate. See *Chemehevi Tribe of Indians* v. *FPC*, 420 U.S. 395, 409-410, 95 S.Ct. 1066, 1075-1076, 43 L.Ed.2d 279, 289-290 (1975); *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 433-434, 91 S.Ct. 849, 854-855, 28 L.Ed.2d 158, 165-166 (1971); *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381, 89 S.Ct. 1794, 1802, 23 L.Ed.2d 371, 284 (1969); *Udall* v. *Tallman*, 380 U.S. 1, 16, 85 S.Ct. 792, 801, 13 L.Ed.2d 616, 625 (1965).

Appellants suggest that the Comptroller's clearance regulations reflect a contemporaneous interpretation of § 3512 that includes a third statutory review criterion, "appropriateness." The regulations simply refer to a determination that the forms are "appropriate for collection of the information sought," 4 C.F.R. §§ 10.7, 10.12 (1976). We find no greater support for appellants' expansive construction of this language in the regulations than in the statute itself. Moreover, the agency's statement at the time these regulations were proposed reflects a contemporaneous interpretation of the statute by the Comptroller that comports with his present view, and to which we give the appropriate deference. 39 Fed.Reg. 2436 (1974).

[147] Letter from Monte Canfield, Jr., Director of the General Accounting Office, to FTC Chairman Engman (Aug. 18, 1975) (LB App. 798-802).

On July 1, 1975 the FTC submitted the 1974 LB form to the Comptroller (LB App. 2025). The GAO published the proposed form in the Federal Register on July 8, 1975, 40 Fed.Reg. 28677, soliciting comments from interested persons. The 1974 LB form was cleared for use by the FTC in a letter dated August 18, 1975 from Monte Canfield, Jr., Director of the GAO, to FTC Chairman Engman (LB App. 798-802). See Affidavit of Carl F. Bogar, Asst. Director, Procurement Systems & Acquisition Div., GAO (LB App. 2019).

The Comptroller's August 18 letter indicated that revisions in the LB form for 1973 had improved, in the Comptroller's view, the meaningfulness of the data to be collected. The Comptroller expressly indicated, however, that his views were advisory and not within the standards of review provided by § 3512 (LB App. 801-802).

[148] 44 U.S.C. § 3512(d) (Supp. V 1975).

[149] Joint Appellants LB Brief at 72.

[150] Pub.L. No. 93-153, Title IV, § 409(b), 89 Stat. 593 (1973), codified at 44 U.S.C. § 3512 (Supp. V 1975).

[151] *Id.* The OMB's clearance authority is defined by 44 U.S.C. §§ 3501-3511 (Supp. V 1975).

[152] H.R.Rep. No. 93-624, 93d Cong., 1st Sess. 31 (1973), U.S.Code Cong. & Admin.News 1973, pp. 2417, 2533.

[153] 44 U.S.C. § 3506 (Supp. V 1975) provides:

> Upon the request of a party having a substantial interest, or upon his own motion, the Director of the Bureau of the Budget may determine whether or not the collection of information by a Federal agency is necessary for the proper performance of the functions of the agency or for any other proper purpose. Before making a determination, he may give the agency and other interested persons an opportunity to be heard or to submit statements in writing. To the extent, if any, that the Director determines the collection of information by the agency is unnecessary, for any reason, the agency may not engage in the collection of the information.

[154] Senator Bentsen, author of the enacted amendment, made the following statement on the Senate floor at the time of the amendment's passage:

> Unlike the previous oversight by OMB the GAO (Comptroller) would not make the final decision as to whether the information was needed. That decision would be left with the independent agency. My feeling was that if the General Accounting Office were given veto power over whether information was needed, it is putting them in the policy-decision framework, and I do not think that should be done.

119 Cong.Rec. 24085 (1973). See also *id.* at 23884-23885.

[155] 44 U.S.C. § 3512(d) (Supp. V 1975).

[156] Statutes must be construed when possible to avoid disharmony among their provisions.

[107] 432 F.Supp. at 307-310 (LB App. 227-30).

[108] 44 U.S.C. § 3512(b) (Supp. V 1975) quoted in full, text *supra* at 50-51.

[109] Appellants suggest an alternative theory of statutory construction in support of their claim that the Comptroller is required to analyze the meaningfulness or reliability of the requested data to the agency's stated need. They suggest that the burden inquiry of § 3512(b) should entail a "cost-benefit" analysis balancing the cost to the reporting companies with the benefit to the agency. Since the result of appellants' assertion is inconsistent with the delegation to the agency of the determination of its necessity for the data, we reject the "cost-benefit" theory on the same grounds on which we relied to reject the "appropriateness" theory.

The Commission and the Comptroller raise several additional issues. Both contend that the Comptroller's actions under the Federal Reports Act are not subject to judicial review. Their argument is that by limiting the period of time in which the Comptroller can review regulatory information-gathering forms to 45 days, 44 U.S.C. § 3512(d) (Supp. V 1975). Congress intended to preclude judicial review. See *Morris* v. *Gressette*, 432 U.S. 491, 97 S.Ct. 2411, 53 L. Ed. 2d 506 (1977); *Harris* v. *Bell*, 562 F. 2d 772 (1977). The Commission also suggests that the Comptroller's clearance function is agency action committed to agency discretion and therefore exempt from judicial review under the Administrative Procedure Act, 5 U.S.C. § 701(a)(2) (1976). The District Court rejected this argument, 432 F. Supp. at 307-308. But see *General Electric Co.* v. *FTC*, 411 F. Supp. 1004, 1006 (N.D.N.Y. 1976); *Westinghouse Electric Corp.* v. *FTC*, (S.D.. Ohio 1976). The Commission also suggests that the express purpose of the Federal Reports Act to protect "especially small business enterprises," 44 U.S.C. § 3512(a) (Supp. V 1975), excludes the large corporate appellants from the Act's zone of interest, thereby depriving them of standing to challenge the Comptroller's clearance of the LB form. See *Barlow* v. *Collins*, 397 U.S. 159, 90 S. Ct. 832, 25 L. Ed. 2d 192 (1970). Finally, the Commission contends that the challenge to the Comptroller's clearance is not properly raised as a defense in an enforcement proceeding, *FTC* v. *Texaco, Inc.*, *supra* note 90, 180 U.S. App. D.C. at 407, 555 F. 2d at 879. Since we conclude that the arguments made by the corporations with respect to the Comptroller's exercise of his review and clearance authority under the Federal Reports Act are clearly lacking in merit, we need not consider the various theories propounded by the FTC and the Comptroller.

SIMEON MANAGEMENT CORPORATION et al. v. FEDERAL TRADE COMMISSION*

No. 76—2543. F.T.C. Docket No. 8996.

(United States Court of Appeals, Ninth Circuit, July 18, 1978)

1. AN AGENCY ACTION SUPPORTED BY SUBSTANTIAL EVIDENCE, AND NOT FOUND TO BE ARBITRARY, CAPRICIOUS, AN ABUSE OF DISCRETION OR OTHERWISE NOT IN ACCORDANCE WITH LAW CANNOT BE SET ASIDE BECAUSE COURT MIGHT REACH A DIFFERENT CONCLUSION IN TRYING THE MATTER ANEW.

   Court may not set aside agency action which is based on the exercise of its accu[1138]mulated expertise merely because, with the court trying the matter anew, it might reach a different result; it may not set aside the agency action unless it is apparent that it is unsupported by substantial evidence was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

2. AN APPLICATION MUST BE FILED AND APPROVED BY THE FDA BEFORE A NEW DRUG CAN BE INTRODUCED INTO INTERSTATE COMMERCE, AND SUCH APPROVAL REQUIRES SUBSTANTIAL EVIDENCE OF DRUG'S EFFECTIVENESS FOR LABELED USE.

   A new drug may not be introduced into interstate commerce unless an application has been filed with and approved by the FDA; the FDA may not approve a new drug application unless it finds that there is substantial evidence that the drug is effective for the labeled use.

3. FOR A DRUG'S EFFICACY TO BE GENERALLY RECOGNIZED, EXPERT CONSENSUS OF DRUG'S EFFECTIVENESS FOR LABELED USE MUST BE SUPPORTED BY SUBSTANTIAL EVIDENCE CONSISTING OF APPROPRIATE CLINICAL INVESTIGATIONS; SUCH EVIDENCE IS NOT PROVIDED BY ANECDOTAL EVIDENCE FROM PATIENTS AND DOCTORS.

   A drug can be generally recognized as effective only if the expert consensus is based upon substantial evidence that the drug is effective for the labeled use; anecdotal evidence, such as testimonials by satisfied patients or statements by doctors that, based on their experience, they believe the drug is effective do not constitute adequate and well-controlled investigations and cannot provide substantial evidence of effectiveness.

4. APPROVAL OF NEW DRUG APPLICATION ALONE DOES NOT REMOVE DRUG FROM NEW DRUG STATUS, SINCE SUBSTANTIAL EVIDENCE OF DRUG'S EFFECTIVENESS FOR LABELED USE MAY EXIST LONG BEFORE SUCH EFFICACY IS GENERALLY RECOGNIZED.

   Although substantial evidence of effectiveness for the labeled use is required for a drug to be generally recognized as effective, such substantial evidence may exist long before the drug is generally recognized as effective for that use; approval of a new drug application does not alone, remove the approved drug from new drug status.

5. SUBSTANTIAL EVIDENCE SUPPORTED FTC'S ACCEPTANCE OF FDA DETERMINATION THAT DISPUTED DRUG HAS NEW DRUG

*Reported in 579 F.2d 1137 (1978). For case before the Commission, see 87 F.T.C. 1184.

STATUS WHEN USED FOR WEIGHT REDUCTION, AND CONCLUSION THAT CONSUMERS SHOULD BE APPRISED OF SUCH FACT.

Acceptance by the Federal Trade Commission of the FDA determination that drug used by weight reducing clinic was a new drug when used for the treatment of obesity, and thus that the fact should be disclosued to consumers, was supported by substantial evidence and was reasonable.

6. ONLY THE EVIDENCE BEFORE THE COMMISSION MAY BE CONSIDERED BY APPELLATE COURT IN REVIEWING FTC ACTION.

In reviewing action taken by the Federal Trade Commission, Court of Appeals could consider only the evidence before the Commission and not evidence which had been placed before the district court in a prior action in which the seller had sought an injunction against the FTC.

7. DESPITE STATE ATTORNEY GENERAL'S FAILURE TO DISAPPROVE CLINICS' ADVERTISEMENTS, FTC'S REGULATION OF ADVERTISEMENTS DID NOT IMPERMISSIBLY INTERFERE WITH STATE REGULATION.

Federal Trade Commission regulation of advertisements on behalf of weight loss clinic did not impermissibly interfere with state regulation even though, after reviewing the advertisements pursuant to a state health plan act, the California Attorney General had not disapproved of the nature and contents of the advertisements.

8. A STATE OFFICIAL'S APPROVAL OR DISAPPROVAL OF ADVERTISEMENTS HAD NO BEARING ON THE OPERATION OF FTCA'S REGULATORY SCHEME.

Whether a state official has approved an advertisement or not is irrelevant to the operation of the federal regulatory scheme set forth in the Federal Trade Commission Act.

9. REQUIRING DISCLOSURE OF FDA'S LACK OF APPROVAL FOR DRUG USED IN THE TREATMENT OF OBESITY AFFECTED NEITHER PHYSICIAN-PATIENT RELATIONSHIP NOR PHYSICANS' RIGHT TO PRESCRIBE OR ADMINISTER THE DRUG.

Action of Federal Trade Commission in ordering operators of weight loss clinics to state in their advertisements that one of the drugs being used was a new drug which had not been determined to be effective for obesity did not impermissibly encroach upon the confidential relationship between a physician and a patient; the FTC order did not affect the right of a physician to prescribe or administer the drug for his or her patients but merely prevented the weight loss clinics from advertising their clinics and weight reduction program in a way which failed to disclose that the FDA had not approved the drug for such use.

10. FTC WAS NOT BURDENED WITH PROVING THAT WEIGHT LOSS PROGRAM WAS UNSAFE OR INEFFECTIVE BY REQUIRING DISCLOSURE OF FDA'S FAILURE TO APPROVE DRUG USED IN THE PROGRAM.

[1139] Where FTC sought an order requiring weight loss clinics to disclose in their advertisements the fact that one of the drugs being used in the program was a new drug which had not been determined by the FDA to be effective for obesity, FTC did not have the burden of proving that the weight loss clinics' program was unsafe or ineffective.

11. A FACTUALLY CORRECT ADVERTISEMENT MAY BE RENDERED FALSE AND DECEPTIVE WITHIN MEANING OF THE FTCA BY THE OMISSION OF RELEVANT INFORMATION.

Failure of a seller to disclose material information in advertising may cause the advertisement to be false or deceptive within the meaning of the Federal Trade Commiussion Act even though the advertisement does not state false facts.

12. UNDER CERTAIN CIRCUMSTANCES, AN ADVERTISEMENT MAY BE RENDERED DECEPTIVE BY THE OMISSION OF A RELEVANT FINDING OF ANOTHER REGULATORY AGENCY.

A finding of another regulatory agency may, under certain circumstances, be material information, the omission of which could cause an advertisement to be deceptive.

13. WHERE ADVERTISING CLAIM OF SAFETY AND EFFECTIVENESS COULD REASONABLY LEAD CONSUMERS TO BELIEVE THAT DRUG USED IN THE WEIGHT REDUCTION PROGRAM HAD FDA APPROVAL FOR SUCH USE, ADVERTISEMENTS WHICH FAILED TO DISCLOSE THE LACK OF FDA APPROVAL WERE PROPERLY FOUND TO BE DECEPTIVE.

Evidence sustained finding of the Federal Trade Commission that advertisements for weight loss clinic which referred to the clinic's use of human chorionic gonadotropin (HCG) could reasonably lead consumers to believe that the claims of safety and effectiveness of the program were based on a determination by the appropriate administrative agency and thus that the failure of the weight loss clinic to disclose in its advertisements the fact that HCG had not been approved by the FDA as a new drug safe and effective for the treatment of obesity rendered the advertisements deceptive.

14. DECEPTIVE WITHIN THE MEANING OF THE FTCA IS CONSTITUTED BY ADVERTISEMENTS HAVING THE CAPACITY TO DECEIVE.

Advertisements having the capacity to deceive are deceptive within the meaning of the Federal Trade Commission Act; actual deception need not be shown.

15. UPON FINDING ADVERTISEMENT TO BE DECEPTIVE, FTC MAY REASONABLY INFER THAT DECEPTIVE INFORMATION WOULD MATERIALLY AFFECT CONSUMER'S BUYING DECISION.

Once the FTC has found an advertisement to be deceptive, it is authorized, within the bounds of reason, to infer that the deceptive information would be a material factor in the consumer's decision to buy.

16. AN FTC ORDER REASONABLY RELATED TO THE PRACTICES FOUND TO BE UNLAWFUL AND SUFFICIENTLY CLEAR AND PRECISE TO BE UNDERSTOOD BY RESPONDENTS WILL BE UPHELD, SINCE THE AGENCY HAS WIDE DISCRETION IN FASHIONING APPROPRIATE ORDERS.

Federal Trade Commission has much discretion in fashioning an appropriate order and the order will be upheld unless it has no reasonable relation to the practices found to be unlawful or was not sufficiently clear and precise to be understood by those against whom it is directed.

17. FTC ORDER REQUIRING DISCLOSURE OF DRUG'S LACK OF BOTH FDA APPROVAL AND SUBSTANTIAL EVIDENCE ATTESTING TO ITS EFFECTIVENESS IN THE TREATMENT OF OBESITY WAS NEITHER UNCLEAR NOR OVERLY BROAD.

Although somewhat broad, order of the FTC requiring operators of weight loss clinics to disclose in their advertising that weight reduction treatments involved injection of a prescription drug which had not been approved by the FDA as safe and effective in the treatment of obesity or weight control and

that there was no substantial evidence that the drug increased weight loss beyond that resulting from calorie restriction, that it caused a more attractive or normal distribution of fat, or that it decreased hunger and discomfort associated with calorie restricted diets was not overbroad and was sufficiently clear to be understood by those against whom it was directed.

Operators of weight loss clinics sought to have cease and desist order of the Federal Trade Commission set aside. The Court of Appeals, Burns, United States District Judge for the District of Oregon, sitting by designation, held that: (1) FTC's acceptance of an FDA determination that drug used in the weight loss clinic had not been shown to be safe and effective for obesity was supported by substantial evidence; (2) order requiring that fact to be disclosed in advertisements for the weight loss clinic did not impermissibly encroach on the physician-patient relationship; (3) fact that the advertisements had been approved by the California Attorney General under the Knox-Mills Health Plan Act did not preclude FTC regulation of the advertisements, and (4) evidence sustained Commission determination that advertisements could reasonably lead consumers to believe that the claims of safety and effectiveness for the program were based on determination by the appropriate administrative agency so that it was reasonable for the FTC to order that the program's advertisements disclosed the lack of FDA approval of the drug.

Petition denied.

(Syllabus, with substituted captions, taken from 578 F.2d 1137)

Jerry S. Phillips (argued) of *Grayson & Gross, Inc.*, Los Angeles, Cal., for petitioners.

David Fitzgerald (argued), Washington, D.C., for respondent.

On Petition to Review an Order of the Federal Trade Commission.

Before WRIGHT and TANG, *Circuit Judges*, and BURNS,† *District Judge*.

BURNS, *District Judge:*

Petitioners ask the court to set aside a cease and desist order of the Federal Trade Commission (FTC or Commission) requiring them to make certain disclosures in their advertising. The Commission entered the order pursuant to its finding that, without such information, the advertisements were deceptive, unfair and false, in violation of sections 5[1] and 12[2] of the Federal Trade Commission Act (FTCA),

† Honorable James M. Burns, United States District Judge, District of Oregon, sitting by designation.

[1] Section 5(a) of the FTCA, 15 U.S.C. § 45(a), provides:

(a)(1) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful.

(2) The Commission is empowered and directed to prevent persons, partnerships, or corporations . . . from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.

Section 5(b), 15 U.S.C. § 45(b), authorizes the FTC to issue complaints, hold hearings and issue cease and desist orders for violation of the FTCA.

[2] Section 12 of the FTCA, 15 U.S.C. § 52, provides:

(a) Unlawfulness. It shall be unlawful for any person, partnership, or corporation to disseminate, or cause to be disseminated, any false advertisement—

(1) By United States mails, or in or having an effect upon commerce, by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly the purchase of food, drugs, devices, or cosmetics; or

(Footnote Continued)

15 U.S.C. §§ 45, 52 (1976). *Simeon Management Corp., et al.*, 87 F.T.C. 1184, 1229 (1976).

We have jurisdiction under 15 U.S.C. §§ 45(c), (d). We decline to set aside or modify the order.

Petitioners are corporations and individuals engaged in the business of setting up, operating and promoting weight reduction clinics. They provide management and support services to the licensed physicians and nurses who administer the treatment offered by the clinics.

The clinics utilize the "Simeons" method for weight reduction. After an initial physical examination by a licensed physican, the patients are put on a four to six week treatment program which generally includes a 500 calorie per day diet, daily medical counseling and daily injections of human chorionic gonadotropin (HCG).

HCG is a prescription drug derived from the urine of pregnant women. The Federal Drug Administration (FDA) has declared that HCG is a new drug and has approved it for some users,[3] but not for use in the [1141] treatment of obesity. 39 Fed.Red. 42397-403 (1974). FDA found that there is no substantial evidence that HCG is safe or effective for such use. 39 Fed.Reg. at 42397.

As one of the principal means of promoting the business of their weight reduction clinics, petitioners place advertisements in newspapers, magazaines and on television. These advertisements represent that the treatment program utilized at the clinics is safe, effective and medically approved. Representative samples of the advertisements include:

1. Medically supervised weight loss. Lose weight safely, quickly and effortlessly through our proven weight reduction program developed by Medical Doctors and supervised by our Physicians and Nurses. Simeon Weight Clinics, its Doctors, Nurses and professionally trained staff, bring you a quick and safe way to melt away unwanted pounds. R. 6.

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(2) By any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase in or having an effect upon commerce, of food, drugs, devices, or cosmetics.

(b) Unfair or deceptive act or practice

The dissemination or the causing to be disseminated of any false advertisement within the provisions of subsection (a) of this section shall be an unfair or deceptive act or practice in or affecting commerce within the meaning of section 45 of this title.

Section 15(a)(1) of the FTCA, 15 U.S.C. § 55(a)(1), defines "false advertisement" for the purpose of section 12 as:

> an advertisement, other than labeling, which is misleading in a material respect and in determining whether any advertisement is misleading, there shall be taken into account (among other things) not only representations made or suggested by statement, word, design, device, sound, or any combination thereof, but also the extent to which the advertisement fails to reveal facts material in light of such representations or material with respect to consequences which may result from the use of the commodity to which the advertisement relates under the conditions prescribed in said advertisement, or under such conditions as are customary or usual.

[3] HCG has been approved as safe and effective for use in the treatment of cryptorchidism (undescended testicles) not due to anatomical obstruction, hypogonadism in males, if secondary to pituitary deficiency, and some forms of infertility in females. 39 Fed.Reg. 42397-402 (1974).

2. Serious weight loss is a doctor's business and the doctors and nurses at over 100 Simeons Weight Clinics are helping thousands of men and women lose unwanted pounds and inches quickly, privately and without strenuous exercise. Your weight loss, like your health, is a medical matter which belongs in the hands of a physician. R. 105.

3. Simeons takes the gamble out of reducing with medically supervised weight loss. Lose weight now . . . quickly . . . safely. R. 108.

The advertisements do not mention HCG or that injection of a drug may be part of the treatment program.

Petitioners' clinics were registered under the Knox-Mills Health Plan Act, 1965 Cal. Stats., c. 880, p. 2482, § 1 (repealed 1976). Pursuant to that Act, their advertisements were reviewed by the California Attorney General's Office prior to dissemination.

On October 15, 1974, the Commission commenced administrative proceedings against the petitioners by issuing a complaint. The complaint alleged that the petitioners' advertisements were deceptive, unfair and false because they failed to disclose that the treatments offered involved injection of HCG and that HCG was not approved by the FDA as safe and effective for use in weight control. *Simeon, supra*, 87 F.T.C. at 1193. It also alleged that the advertisements were unfair because they promoted a "costly" treatment involving the use of a drug which had not been approved by the FDA as safe and effective for such use. *Id.* The notice of contemplated relief accompanying the complaint indicated that the Commission might order petitioners to cease and desist advertising any weight reduction program involving the use of HCG or any other drug which is required to be and has not been approved by the FDA as safe and effective for such use. *See Id.* at 1224.

An administrative law judge held adjudicative hearings, at which thirteen witnesses testified, ten on behalf of petitioners. The administrative law judge ruled that the petitioners' advertisement of a weight reduction treatment program which included injection of a prescription drug not approved by the FDA as safe and effective for such use without disclosing the lack of approval was deceptive, unfair and false advertising. *Id.* at 1223. He did not find that petitioners had acted unfairly by advertising a "costly" treatment program which involved use of a drug not approved by the FDA for such use. Rather than ordering petitioners to stop advertising altogether, the administrative law judge ordered them to make specified disclosures[4] in further advertising. *Id.* at 1224-6.

Both sides appealed from the initial decision to the Commission. After considering oral arguments, the whole record and the [1142] parties' briefs, the Commission[5] also concluded that petitioners'

[4] The administrative law judge's cease and desist order also contained other provisions, from which the petitioners did not appeal.

[5] The three participating Commissioners rendered a unanimous decision.

advertisements were deceptive, unfair and false because of the failure to disclose specified information. *Id.* at 1230-1.

The Commission issued a final cease and desist order requiring the petitioners to disclose in any advertisements for the clinics or the treatment program that:

1) the weight reduction treatment involve injection of a prescription drug[6] which has not been approved by the FDA as safe and effective in the treatment of obesity or weight control, and

2) there is no substantial evidence that the drug increases weight loss beyond that resulting from caloric restriction, that it causes a more attractive or "normal" distribution of fat, or that it decreases the hunger and discomfort associated with calorie-restrictive diets. *Id.* at 1236.[7]

I.

Another phase of this case has been here before. Concurrently with the filing of the administrative complaint against the petitioners, the Commission sought a preliminary injunction pending the outcome of the agency proceedings in order to stop petitioners from advertising their weight control treatments as long as the treatments involved the use of HCG or any other drug which had not been approved by the FDA for such use. The district court denied the Commission's request for a preliminary injunction. On appeal, we affirmed. *F.T.C.* v. *Simeon Management Corporation*, 391 F.Supp. 697 (N.D.Cal.1975), *aff'd*, 532 F.2d 708 (9th Cir. 1976).

The standard of review applicable at this stage of the proceedings is different from the standard applicable when the case was last before the court. When reviewing the district court's denial of the preliminary injunctions, we point out that the denial would not be reversed unless the district court had based its decision upon an erroneous legal premise or had abused its discretion in balancing the equities and determining whether the FTC was *likely* to succeed on the merits. *Simeon, supra*, 532 F.2d at 711, 713-4.

[1]The case now comes to us after completion of the full panoply of agency procedure specified by statute. Further, the case comes to us from an agency charged with the regulation of advertising. As a result of such regulation, the FTC has accumulated much expertise. We are not to lightly set aside agency action based on the exercise of such accumulated expertise merely because, were we trying the matter anew, we might reach a different result. We are not to set aside the Commission's action unless it is apparent that it is unsupported

[6] The Commission deleted the specific reference to HCG from the administrative law judge's order.

[7] The FDA requires all advertising and labeling for HCG to contain nearly identical disclosures. 39 Fed.Reg. at 42401-2.

by substantial evidence, 15 U.S.C. § 45(c); 5 U.S.C. § 706(2)(E), or is arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law. 5 U.S.C. § 706(2)(A). *Feil* v. *F.T.C.*, 285 F.2d 879, 882-3 (9th Cir. 1960).

II.

Petitioners urge six separate contentions.

1) Petitioners contend that we should reverse because there has been no purchase of the drug in question, and thus section 12 of the FTCA is inapplicable. See note 2 *supra.* This contention was rejected in the earlier injunction proceedings. *See Simeon, supra,* 532 F.2d at 711. We need not address it here because we hold that the FTC correctly found the advertisements in question to be "deceptive" within the meaning of the Act's section 5.

2) Petitioners contend that HCG is not a new drug within the meaning of the Federal Food, Drug and Cosmetic Act, 21 U.S.C. § 301 *et seq., as amended* (Supp. V, 1975) (FDCA), and hence does not need FDA [1143] approval. They base this contention upon the fact that the FDA has approved HCG for some medical uses.

> The Term 'new drug' means—
> (1) Any drug . . . the composition of which is such that such drug is *not generally recognized, among experts* qualified by scientific training and experience to evaluate the safety and effectiveness of drugs, *as safe and effective* for use under the conditions prescribed, recommended, or suggested in the labeling thereof . . .. 21 U.S.C. § 321(p)(1) (Emphasis added.)

[2, 3] A new drug may not be introduced into interstate commerce unless an application has been filed with and approved by the FDA. 21 U.S.C. § 355(a). The FDA cannot approve a new drug application unless it finds that there is substantial evidence that the drug is effective for the labeled use. 21 U.S.C. § 355(d). Further, a drug can be generally recognized as effective only if that expert consensus is based upon substantial evidence that the drug is effective for the labeled use. *Weinberger v. Hynson, Westcott & Dunning,* 412 U.S. 609, 629-30, 632, 93 S.Ct. 2469, 37 L.Ed.2d 207 (1973).

In this context, substantial evidence means

> evidence consisting of *adequate and well-controlled* investigations, *including clinical* investigations, *by experts* qualified by scientific training and experience to evaluate the effectiveness of the drug involved, on the basis of which it could fairly and responsibly be concluded by such experts that the drug will have the effect it purports or is represented to have . . .. 21 U.S.C. § 355(d); *Weinberger, supra,* 412 U.S. at 630, 93 S.Ct. 2469 (emphasis added).

FDA regulations set forth the essentials of an adequate and well-controlled clinical investigation. 21 C.F.R. § 314.111(a)(5)(ii). Anecdotal evidence, such as testimonials by satisfied patients or statements by doctors that, based on their experience, they "believe" a drug is effective do not constitute adequate and well-controlled investigations and cannot, therefore, provide substantial evidence of effectiveness. *Weinberger, supra,* 412 U.S. at 618-19, 629-30, 93 S.Ct. 2469.

[4] Although substantial evidence of effectiveness for the labeled use is required for a drug to be generally recognized as effective, such substantial evidence may exist long before the drug is generally recognized as effective for that use. *See Id.* at 629-32, 93 S.Ct. 2469. Thus, approval of a new drug application does not, alone, remove the approved drug from new drug status.

[5] The FTC did not independently determine that HCG is a new drug when used for the treatment of obesity. It merely declined to challenge the FDA determination because the record before it lacked substantial evidence that HCG is effective for such use. *Simeon, supra,* 87 F.T.C. at 1232. Petitioners do not, and indeed could not dispute the fact that the FDA has declared HCG to be a new drug when used for the treatment of obesity. The Commission's acceptance of the FDA determination is supported by the applicable legal precedents and substantial evidence on the record as a whole, and hence cannot be set aside. *See* 5 U.S.C. §§ 706(2)(A), (2)(E); 15 U.S.C. § 45(c).

[6] The evidence[8] presented by petitioners consisted of testimonials by satisfied patients and statements[9] by doctors who use the "Simeons" method that they have concluded, on the basis of their experience, that HCG is safe and effective in the treatment of obesity. As noted above, such anecodotal evidence does not constitute substantial evidence. FTC counsel relied upon [1144] 1) the FDA notice, which contained critical evaluations of the studies investigating the effectiveness of HCG in the treatment of obesity; 2) testimony from a California physician that his review of the medical literature revealed no scientific evidence that HCG is effective in the treatment of obesity; and 3) extensive testimony from the physician responsible for the medical content of the FDA notice on HCG. He testified about FDA drug regulation, new drug status, the requirements for approval of a new drug, available information on the safety and effectiveness of HCG and the conclusion of the FDA that there is no substantial evidence that HCG is safe and effective for use in the treatment of obesity.

[8] In their brief, petitioners refer to evidence introduced in the district court injunction proceedings. Since we are now reviewing the Commission's action and not that of the district court, we are constrained to consider only the evidence before the Commission.

[9] These statements were made in live testimony, affidavits and literature.

Such evidence amply supports the FTC determination that the record before it lacked substantial evidence that HCG is safe and effective in the treatment of obesity. Without such substantial evidence in the record before the FTC, that agency would have no basis for challenging the FDA's determination that HCG is a new drug. *Cf. Weinberger, supra,* 412 U.S. at 629-30, 93 S.Ct. 2469.

3)Petitioners also contend that we should set aside the cease and desist order because, after reviewing the advertisements pursuant to the Knox-Mills Health Plan Act, the California Attorney General did not disapprove of their nature and contents. Petitioners argue that this failure to disapprove constitutes a prima facie determination that the advertisements are representative, fair and legal. They also argue that FTC regulation of their advertisements impermissibly interferes with the state regulation.

[7, 8] These contentions lack merit. Whether a state official has approved the advertisements or not is irrelevant to the operation of the federal regulatory scheme set forth in the FTCA. *See Royal Oil Corporation* v. *F.T.C.,* 262 F.2d 741, 743 (4th Cir. 1959); *cf. United States* v. *California,* 297 U.S. 175, 183-4, 56 S.Ct. 421, 80 L.Ed. 567 (1936). That scheme does not impermissibly intrude upon state regulation. *Cf. Double-Eagle Lubricants, Inc.* v. *State of Texas,* 248 F.Supp. 515, 517-18 (N.D.Tex. 1965) *appeal dismissed,* 384 U.S. 434, 86 S.Ct. 1601, 16 L.Ed.2d 670 (1966).

4) Petitioners contend that the FTC has no jurisdiction to encroach upon the confidential relationship between a physician and patient. They argue that, because HCG is administered by or under the supervision of a physician as part of the weight reduction program, the Commission has no jurisdiction to regulate the advertising used in promoting the clinics.

[9] This contention also lacks merit. The Commission's order does not pretend to affect the right of a physician to prescribe or administer HCG for his or her patients as part of a course of weight reduction treatments. The order prevents petitioners from advertising their clinics and weight reduction program in a way which fails to disclose that the FDA has not aproved HCG for such use and that there is no substantial evidence that HCG is effective in the treatment of obesity. The order in no way impinges upon the traditional physician-patient relationship. *See generally American Medical Ass'n* v. *U.S.,* 317 U.S. 519, 528-9, 63 S.Ct. 326, 87 L.Ed. 434 (1943).

5) Petitioners contend that Federal Trade Commission Rules of Practice § 3.43(a), 16 C.F.R. § 3.43(a), placed upon FTC counsel the burden of proving that petitioners' weight reduction program is unsafe and ineffective and that the FTC failed to carry that burden.

[10] Petitioners' contention lacks merit. Section 3.43(a) provides that "the Commission . . . shall have the burden of proof, but the pro-

ponent of any factual proposition shall be required to sustain the burden of proof thereto." Petitioners' argument rests upon the proposition that, by charging that petitioners' advertisements are false, deceptive and unfair, the FTC asserts that the program is unsafe or ineffective. The complaint, however, did not allege, and the FTC was not required to [1145] prove, that the weight reduction program is unsafe or ineffective.

[11] Failure to disclose material information may cause an advertisement to be false or deceptive within the meaning of the FTCA even though the advertisement does not state false facts. 15 U.S.C. §§ 52, 55(a)(1); *cf. Brite Manufacturing Co.* v. *F.T.C.*, 120 U.S. App.D.C. 383, 347 F.2d 477 (1965); *Kerran* v. *F.T.C.*, 265 F.2d 246 (10th Cir.), *cert. denied*, 361 U.S. 818, 80 S.Ct. 61, 4 L.Ed.2d 64 (1959). This is the sort of falsity and deception charged.

6) Finally, petitioners contend that HCG has not been shown to be unsafe and ineffective when used in a comprehensive weight loss program and hence advertisements describing the program as safe and effective are not and cannot be found to be deceptive, false or unfair. This contention also lacks merit.

[12] The Commission found that (1) some consumers will reasonably believe that the government exercises control over the promotion and use of prescription drugs; (2) this belief is intensified by the advertisements' representations that the weight loss treatments are safe, effective and medically approved; and (3) the representations may therefore reasonably lead consumers into the mistaken belief that the claims of safety and effectiveness are based, not on the advertiser's own opinion, but on a determination by the FDA. It further found that, in view of the public's belief that the government strictly regulates drugs, the fact that the treatments involve administration of a drug lacking FDA approval for such use may materially affect a consumer's decision to undergo the treatment. Accordingly, the Commission declared that the failure to disclose that the weight reduction treatments involve injection of a drug lacking FDA[10] approval for such use renders the advertisements deceptive and thus in violation of § 5 of the FTCA. *Simeon, supra*, 87 F.T.C. at 1230.

"[I]n the last analysis, the words 'deceptive practices' set forth a legal standard and they must get their final meaning from judicial construction." *FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 385, 85 S.Ct. 1035, 1043, 13 L.Ed.2d 904 (1965). Nevertheless, the courts

[10] The Commission appears to be plowing new ground through what might be called a piggyback process: the utilization of the finding of a sister agency as the underpinning for a finding that advertising brings about the substantive evils Congress sought to eradicate through the FTC processes. A finding of a sister agency, however, like any other fact or circumstance, may, under certain circumstances, be material information the omission of which could cause an advertisement to be deceptive.

must give great weight to the Commission's judgment. *Id.* This is particularly true in cases of alleged deceptive advertising, because such cases "necessarily require 'inference and pragmatic judgment'." *Resort Car Rental System, Inc.* v. *F.T.C.*, 518 F.2d 962, 963 (9th Cir. 1975), quoting *Colgate, supra*, 380 U.S. at 385, 85 S.Ct. 1035.

The need for the courts to defer to the Commission's judgment results in part from the statutory scheme and in part from the weight of accumulated agency expertise. The generality of the § 5 proscriptions "necessarily gives the Commission an influential role in interpreting § 5 and in applying it to the facts of particular cases arising out of unprecedented situations." *Colgate, supra*, 380 U.S. at 385, 85 S.Ct. at 1042. Determining whether a particular advertisement is deceptive requires a familiarity with the expectations and beliefs of the public, especially where the alleged deception results from an omission of information instead of a statement. The Commission has been engaged in making such determinations since 1938, when its jurisdiction was extended to include the prevention of unfair or deceptive acts or practices in commerce. *See Id.* at 384-5, 85 S.Ct. 1035. As a result, the Commission has accumulated extensive experience and is therefore generally in a better position than the courts to determine when a practice is deceptive within the meaning of the FTCA. *FTC* v. *Mary Carter Paint Co.*, 382 U.S. 46, 48, 86 S.Ct. 219, 15 L.Ed.2d 128 (1965); *Colgate, supra*, 380 U.S. at 385, 85 S.Ct. 1035.

[1146] This court has previously stated that advertisements "capable of being interpreted in a misleading way should be construed against the advertiser." *Resort Car, supra*, 518 F.2d at 964. According great weight to agency findings of deception furthers this principle.

[13, 14] In our opinion affirming the denial of injunctive relief in this case, we noted that there could be no deception unless the public holds a belief contrary to material facts not disclosed by the advertisement. *Simeon, supra*, 532 F.2d at 716. The Commission found that the advertisements could[11] reasonably lead consumers to believe that the claim of safety and effectiveness are based on a determination by the appropriate administrative agency. In view of the currently pervasive level of governmental regulation, particularly in the medical field, we cannot say that this determination is unreasonable, arbitrary, capricious or an abuse of discretion.

The advertisements represent that the Simeon program, as a whole, is safe and effective. Therein lies the crux of the material omis-

[11] Advertisements having the capacity to deceive are deceptive within the meaning of the FTCA; actual deception need not be shown. *Goodman* v. *Federal Trade Commission*, 244 F.2d 584, 602 (9th Cir. 1957). It is well settled that "[t]he Federal Trade Commission has the expertise to determine whether advertisements have the capacity to deceive or mislead the public. Consumer testimony, although sometimes helpful, is not essential." *Resort Car, supra*, 518 F.2d at 964; *see Colgate, supra*, 380 U.S. at 385, 391-2, 85 S.Ct. 1035.

sion. The public is entitled to know that the "Simeon method" entails injection of a prescription drug that has not been found to be safe and effective in the treatment of obesity. The statements in the advertisements could lead the consumer to believe that HCG injections, which are a constant aspect of Simeon's course of treatment, have been determined to be safe and effective for weight reduction. This belief is contrary to fact. That the belief is attributable in part to factors other than the advertisement itself does not preclude the advertisements from being deceptive. *Cf. Brite, supra,* 347 F.2d at 477.

[15] Once the Commission has found an advertisement to be deceptive, it is authorized, within the bounds of reason, to infer that the deceptive information would be a material factor in the consumer's decision to buy. *Colgate, supra,* 380 U.S. at 392, 85 S.Ct. 1035. The Commission found that the fact that the advertised treatments involve administration of a drug lacking FDA approval for such use might materially affect the consumer's decision to obtain such treatments. Again, in view of the extent of governmental regulation in this area, we cannot say that this determination is unreasonable.

The cases cited by petitioners are inapposite. Petitioners rely mainly on *Raladam Co.* v. *Federal Trade Commission,* 42 F.2d 430 (6th Cir. 1930), *aff'd* 283 U.S. 643, 51 S.Ct. 587, 75 L.Ed. 1324 (1931); *Alberty* v. *Federal Trade Commission,* 86 U.S.App.D.C. 238, 182 F.2d 36, *cert. denied,* 340 U.S. 818, 71 S.Ct. 49, 95 L.Ed. 601 (1950), and *Federal Trade Commission* v. *Rhodes Pharmacal Co.,* 191 F.2d 744 (7th Cir. 1951).

Raladam was decided before the Commission's jurisdiction was extended in 1938. It relies heavily on the proposition, overturned by the 1938 amendment, that the Commission does not have jurisdiction to issue cease and desist orders to prevent deception of consumers.

We have previously noted that the *Alberty* decision dealt only with the question whether the advertisement involved was false under § 12 of the FTCA and not whether it was deceptive under the more comprehensive provisions of § 5. *Feil, supra,* 285 F.2d at 899. We also noted that one ground of decision was the failure of the FTC to make findings to support its order. *Id.* In this case, the Commission has made such findings.

Rhodes is distinguishable on several grounds. First, as in *Alberty,* the advertiser was charged only with false, and not deceptive, advertising. Second, the court was not reviewing final agency action, but a district court's denial of preliminary in[1147]junctive relief pending outcome of the agency proceedings. Third, the ground for the reversal was that the district court had applied an incorrect standard for determining when injunctive relief would be appropriate.

For the foregoing reasons, we hold that the Commission's determination that the petitioners' advertisements are deceptive in viola-

tion of § 5 of the FTCA is supported by substantial evidence on the record as a whole and is not arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law.

The Commission is authorized, and indeed required, to prevent such deceptive advertising by issuing a cease and desist order. 15 U.S.C. §§ 45(a)(2), (b).

[16, 17] Petitioners do not challenge the form or substance of the disclosures required by the Commission's order. The Commission has much discretion in fashioning an appropriate order. *Colgate, supra,* 380 U.S. at 392, 85 S.Ct. 1035. The order will be upheld unless it has no reasonable relation to the practices found to be unlawful, *Fed. Trade Comm'n* v. *Ruberoid Co.,* 343 U.S. 470, 473, 72 S.Ct. 800, 96 L.Ed. 1081 (1952), or is not sufficiently clear and precise that it may be understood by those against whom it is directed. *Colgate, supra,* 380 U.S. at 392, 85 S.Ct. 1035. Although it is somewhat broad, the order issued in this case meets these requirements.

Since we uphold the order as a means of preventing deceptive advertising, we express no opinion on the merits of petitioners' contentions that the advertisements are not false or unfair.

Petition denied and the Commission's order enforced.

FEDERAL TRADE COMMISSION
v.
BEATRICE FOODS CO. and TROPICANA PRODUCTS, INC.*

Civ. A. No. 78-1260. F.T.C. Docket No. 9112.

(United States District Court, District of Columbia, July 18, 1978)

In denying FTC petition for preliminary injunction against the consummation of a merger between two food companies, court held that FTC was unlikely to succeed on the merits of its claim that the proposed merger would violate Section 7 of the Clayton Act, since the agency had not shown that there had been any appreciable degree of competition on a national basis between the companies in the processing, distribution and sale of ready-to-serve orange juice.

William A. Doying, Washington, D.C., for plaintiff.
David S. Oeker, Washington, D.C., for defendants.

Before HART, *District Judge.*

ORDER DENYING PRELIMINARY INJUNCTION

Upon consideration of the application for a Preliminary Injunction filed by the piaintiff herein, and after a hearing held on July 17 and 18, 1978, at which the Court received voluminous documentary evidence from both parties and heard six witnesses proffered by defendants, and after consideration of the weight and competence of the evidence and argument from counsel for all parties, it appears to the Court that Beatrice Foods Company and Tropicana Products, Inc. have not been shown to be competitors in the processing, distribution and sale of ready to serve orange juice on a national basis to any appreciable degree, and that such competition as exists between them nationally is *de minimis.*

Therefore, after weighing the equities and concluding that it does not appear likely that the plaintiff will ultimately succeed and prevail on the merits, it is by the Court this 18th day of July, 1978,

Ordered, that the Application for a Preliminary Injunction be, and the same is hereby, denied.

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*Not reported in Federal Reporter. Reported in Trade Reg. Rep. ¶ 62,148 at 75,068 (1978-2 Trade Cases). *Aff'd* without opinion, 580 F.2d 701 (D.C. Cir. 1978); *Rehearing en banc denied,* 587 F.2d 1225 (D.C. Cir. 1978).

REUBEN H. DONNELLEY CORPORATION *v.* FEDERAL TRADE COMMISSION et al.*

Nos. 78-1052, 78-1194. F.T.C. Docket No. 9079.

(United States Court of Appeals, Seventh Circuit, August 2, 1978)

1. FTC IS NOT A "RESIDENT" OF THE NORTHERN DISTRICT OF ILLINOIS, FOR VENUE PURPOSES, BECAUSE IT MAINTAINS A REGIONAL OFFICE IN CHICAGO.

   That Federal Trade Commission maintained a regional office in Chicago, Illinois, did not make it a resident of the Northern District of Illinois for venue purposes.

2. WHERE A FEDERAL OFFICER PERFORMS HIS OFFICIAL DUTIES IS HIS PLACE OF RESIDENCE, FOR VENUE PURPOSES.

   For venue purpose, residence of a federal officer is the place where he performs his official duties.

3. RATHER THAN CHANGE PREVIOUSLY ESTABLISHED "RESIDENCE" DEFINITIONS, CONGRESS, BY ITS 1962 ENACTMENT, CHOSE TO BROADEN THE NUMBER OF PLACES IN WHICH GOVERNMENT OFFICIALS AND AGENCIES COULD BE SUED.

   Purpose of 1962 enactment specifying judicial districts in which a civil action may be brought against federal officers and agencies was to broaden number of places where such officials and agencies could be [265] sued; manner Congress chose to effectuate such objective was by adding additional venue choices to a plaintiff, not by changing previously established definitions of residence.

4. FTC'S RESIDENCE, FOR VENUE PURPOSES, IS THE DISTRICT OF COLUMBIA.

   For venue purposes, residence of Federal Trade Commission is the District of Columbia.

5. THAT BOTH PUBLICATION AND DISPUTED PUBLISHING POLICIES AROSE IN CHICAGO, OR THAT THE IMPACT OF ANY FTC ACTION WOULD BE FELT IN ILLINOIS DID NOT PLACE CAUSE OF ACTION IN THE NORTHERN DISTRICT OF ILLINOIS.

   For purposes of action by publishing company to prevent administrative hearing on complaint charging violation of Federal Trade Commission Act the cause of action did not arise in the Northern District of Illinois on ground that subject airline guide was published in the Chicago metropolitan area and that publishing policies which allegedly violated the Act which were formulated there or that impact of any Commission action, for example, a cease and desist order, would be felt by publisher in Illinois.

6. VENUE WAS IMPROPERLY LAID IN THE NORTHERN DISTRICT OF ILLINOIS SINCE PARTY TO FTC ACTION WAS INCORPORATED IN DELAWARE AND A CORPORATE RESIDENCE IS RESTRICTED TO PLACE OF INCORPORATION.

   For purpose of statute providing that venue of an action against the federal officer or agency may be had in the judicial district where the plaintiff resides, residence of a corporate plaintiff is restricted to the place of incorporation; hence, since publishing corporation seeking to prevent hearing on Federal

*Reported in 580 F.2d 264 (1978); *Amended* Feb. 26, 1979. For case before the Commission, see 95 F.T.C. 1.

Trade Commission administrative complaint was incorporated in Delaware, venue was improperly laid in the Northern District of Illinois.

Publishing company sued Federal Trade Commission and individual commissioners to prevent hearing on administrative complaint charging violation of Federal Trade Commission Act. The United States District Court for the Northern District of Illinois, Bernard M. Decker, J., dismissed complaint for failure to exhaust administrative remedies, and publisher appealed and Commission cross-appealed. The Court of Appeals, Swygert, Circuit Judge, held that: (1) that Commission maintained a regional office in Chicago did not make it a resident of the Northern District of Illinois for venue purpose; (2) for venue purpose, a cause of action did not arise in the Northern District of Illinois on ground that subject airline guide was published in Chicago metropolitan area and publishing policies which allegedly violated the Act were formulated there or that impact of any Commission action would be felt by the publisher in Illinois, and (3) residence of a corporate plaintiff for purpose of statute governing venue of actions against federal officers and agencies is restricted to the place of incorporation and, hence, since publisher was incorporated in Delaware, venue was improperly laid in Northern District of Illinois.

Vacated with directions.

(Syllabus, with substituted captions, taken from 580 F.2d 264)

George W. McBurney, Chicago, Ill., for plaintiff-appellant, cross-appellee.

David C. Shonka, Atty., Washington, D.C., for F.T.C., defendants-appellees, cross-appellants.

Before SWYGERT and TONE, *Circuit Judges,* and JAMESON, *Senior District Judge.*†

SWYGERT, *Circuit Judge.*

The threshold and dispositive issue presented in this appeal relates to the venue provision covering suits against federal officers and agencies.

I

On April 13, 1976 the Federal Trade Commission issued an administrative complaint against the Reuben H. Donnelley Corporation, a publishing company incorporated in Delaware with its principal place of business in New York. In its complaint the Commission charged that Donnelley's publishing policies for the *Official Airline Guide,* a bi-monthly publication which combines in one directory the

†The Honorable William J. Jameson, Senior United States District Judge for the District of Montana, sitting by designation.

passenger flight schedules and fares of all scheduled air lines in North America, violated section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1). More specifically, the Commission alleged that the manner in which the *Guide* displays the schedules and fares of the various classes of air carriers acts to the disadvantage of the smaller carriers and stifles competition within the airline industry.

Donnelley subsequently filed with the administrative law judge a motion to dismiss for want of subject matter jurisdiction. Donnelley asserted that because the Commission has no jurisdiction over air carriers under 15 U.S.C § 45(a)(2), it also has no jurisdiction over the business of air carriers, the only commerce alleged by the Commission to be affected by Donnelley's publishing policies. On March 30, 1977, the administrative law judge issued an order denying the motion to dismiss, noting that Donnelley is not an air carrier and that the statutory exemption of the Federal Trade Commission Act applies only to air carriers.

On June 20, 1977 Donnelley filed this action in the United States District Court for the Northern District of Illinois against the Commission and each of its five individual commissioners. Donnelley sought to prevent the administrative hearings from commencing as scheduled, again asserting that the Commission lacked jurisdiction over its proceedings against it. The Commission moved to dismiss or, in the alternative, for summary judgment. It argued that venue was improperly laid in the Northern District of Illinois, that the district court lacked subject matter jurisdiction because Donnelley had failed to exhaust its administrative remedies before the Commission, and that, since Donnelley is not an air carrier, it and its activities are not statutorily exempt from the Federal Trade Commission Act.

The district court on October 31, 1977 rejected all of the Commission's contentions. The court held that venue in the Northern District of Illinois was proper under 28 U.S.C. § 1391(e)(1) because, in its opinion, the Commission is a resident of Chicago through its regional office.[1] The court also found that the Commission had exceeded its statutory authority in proceeding against Donnelley, and that Donnelley was therefore not required to exhaust its administrative remedies. Accordingly the court enjoined the Commission from pursuing its proceedings.[2]

The Commission thereafter moved for reconsideration of the October order, advising the court of our then recent opinion in

[1] Donnelley also claimed venue was proper pursuant to 28 U.S.C. § 1391(e)(2) and (4). The district court did not reach these contentions in view of its conclusion that the Commission resided in Chicago.

[2] The administrative proceeding was already in progress by this time. Upon being advised of the district court's order, the administrative law judge suspended the proceeding.

Squillacote v. *International Brotherhood of Teamsters*, 561 F.2d 31 (7th Cir. 1977). Upon reconsideration, the district court on December 20, 1977 issued a second order in which it concluded that its original decision—holding Donnelley's action within an exception to the exhaustion doctrine—was erroneous in light of *Squillacote*. Accordingly the court vacated its October order and dismissed Donnelley's complaint for failure to exhaust administrative remedies. (In view of its holding, the court deemed it unnecessary to reconsider its prior ruling that venue was proper.) From that ruling Donnelley appealed and the Commission cross-appealed.

II

At oral argument the parties agreed that venue is the threshold question. Venue in civil actions against federal officers and agencies is governed by 28 U.S.C. § 1391(e). That section provides that an action may be brought in any judicial district in which:

(1) a defendant in the action resides, or
(2) the cause of action arose, or
(3) any real property involved in the action is situated, or
(4) the plaintiff resides if no real property is involved in the action.

Donnelley argues that venue is proper under clauses (1), (2), and (4).

A

[1, 2] Section 1391(e)(1) provides that venue is proper in any district in which "a [federal] defendant in the action resides." The district court concluded that because the Commission maintains a regional office in Chicago, it is a resident of the Northern District of Illinois and therefore venue is proper.[3] We disagree.

Prior to the enactment of § 1391(e) in 1962, a federal official or agency could be sued only at the place of official residence.[4] Under the

[3] Donnelley concedes that venue in the Northern District of Illinois cannot be based on the residence of the five individual commissioners named as defendants. The residence of a federal officer has always been determined by the place where he performs his official duties. *Butterworth* v. *Hill*, 114 U.S. 128, 132, 5 S.Ct. 796, 29 L.Ed. 119 (1885); *Nestor* v. *Hershey*, 138 U.S.App.D.C. 73, 90, 425 F.2d 504, 521 n. 22 (1969); *Stroud* v. *Benson*, 254 F.2d 448 (4th Cir.), *cert. denied*, 358 U.S. 817, 79 S.Ct. 28, 3 L.Ed.2d 59 (1958). *See also* 1 J. Moore, *Federal Practice* 0.142 [7] at 1449 (2d ed. 1977). As all the commissioners reside in the District of Columbia, the question here is limited to whether the Commission itself can be said to reside within the Northern District of Illinois.

[4] There were several reasons why a federal defendant could be sued only in the District of Columbia. First, only the District Court for the District of Columbia had jurisdiction to issue a writ of mandamus compelling federal officials to perform duties owed to plaintiffs. Even if mandamus were not sought, plaintiffs were generally restricted to filing their suits in the District of Columbia. Prior to 1962, venue was governed by § 1391(b) which provided that suit could be brought only where all defendants reside. Often the doctrine of indispensable parties required that the head of a governmental department be joined as a party-defendant. As the vast majority of agency heads have

(Footnote Continued)

prior practice, the Commission could be sued *eo nomine* only in the District of Columbia. The district court believed that the enactment of § 1391(e) changed this practice. In its opinion, limiting the residence of a federal agency such as the Federal Trade Commission solely to the District of Columbia would defeat the congressional purpose of liberalizing the venue provision covering federal defendants.

[3]The congressional purpose of enacting § 1391(e) was indeed to broaden the number of places where federal officials and agencies could be sued. The manner which Congress chose to effectuate this objective was by adding additional venue choices to a plaintiff, not by changing previously established definitions of residence. The is nothing in the statute or its legislative history which suggests that Congress also sought to allow a federal agency to be sued *eo nomine* wherever it may maintain an office. To the contrary, the wording of the statute itself precludes such an expansive interpretation.

To hold that a federal agency can be sued *eo nomine* wherever it maintains an office would, as a practical matter, render subsections (2), (3), and (4) superfluous. With the vast growth of the federal bureaucracy, federal agencies undoubtedly have offices in most, if not all, judicial districts. That being true, there would have been little need for the subsection dealing with the specifics of where the cause of action arose, where the plaintiff resides, and where relevant real estate is situated, if such an expansive interpretation of residency of defendant were intended by Congress. Moreover, such an interpretation would mean that a plaintiff could file a suit in any district regardless of how remote that district's contact may be with the litigation. "The venue statute was not intended to permit forum-shopping, by suing a federal official wherever he could be found, or permitting test cases far from the site of the actual controversy." *Hartke* v. *Federal Aviation Administration*, 369 F.Supp. 741, 746 (E.D.N.Y. 1973).[5]

[4] There is nothing inequitable in limiting the residence of a federal agency to the District of Columbia. That has been the settled law for

their official residences in the District of Columbia, the venue provision required that suit be brought in the United States District Court for the District of Columbia. *See generally* [1962] U.S.Code Cong. & Admin.News at 2784.

To remedy this problem, Congress enacted the Mandamus and Venue Act of 1962, Pub.L. No. 87-748, 76 Stat. 744. Section one of this Act created 28 U.S.C. § 1361, giving all of the district courts jurisdiction of actions in the nature of mandamus to compel an agency or federal official to perform a duty owed to plaintiff. Section two of the act added 28 U.S.C. § 1391(e), creating three new bases on which venue may be rested. *See Liberation News Service* v. *Eastland*, 426 F.2d 1379, 1383-84 (2d Cir. 1970). See also Byse & Fiocca, Section 1361 of the Mandamus and Venue Act of 1962 and Nonstatutory Judicial Review of Federal Administrative Action, 81 Harv.L.Rev. 308 (1967).

[5] Nor can we accept Donnelley's analogy to § 1391(c), which allows suits against corporations wherever they are "doing business." If Congress intended that a federal agency could be sued wherever it was "doing business," it could have easily expressed that intention by adopting language similar to that used in subsection (c).

decades. At least since 1962 plaintiffs have had three venue choices which were previously unavailable.[6]

B

[5] Donnelley alternatively argues that the cause of action arose in the Northern District of Illinois and therefore venue is proper under § 1391(e)(2). It takes this position for two reasons: first, the *Official Airline Guide* is published in the Chicago metropolitan area and the publishing policies which are alleged to violate the Federal Trade Commission Act were formulated there,[7] and second, the impact of any Commission action, for example, a cease and desist order, will be felt by Donnelley in Illinois.

Donnelley's first argument suffers from a basic flaw. It confuses its cause of action against the Commission with the Commission's cause of action against Donnelley. The subject matter of Donnelley's action arose when the Commission filed a complaint against Donnelley. The administrative complaint was issued in Washington, D.C. The administrative law judge, who Donnelley alleges improperly denied its motion to dismiss, resides in the District of Columbia. The administrative proceedings and hearing have been held in Washington. In short, all of the actions which underlie Donnelley's suit against the Commission took place in the District of Columbia.

Donnelley's second argument—that the cause of action arose in the Northern District of Illinois because "any cease and desist order which *might* be issued by the Commission against Donnelley and the [*Guide*] would have its impact in the Northern District"—presents a novel extension of the federal venue provisions. Federal courts have used a number of different approaches in determining the place where "the cause of action arose." *See* cases collected in Note, *Federal Venue: Locating the Place Where the Claim Arose*, 54 Texas L.Rev. 392 (1976). One such approach has been the place where the injury has occurred because injury is viewed as an essential element of a cause of action.[8] *See, e.g., Maney* v. *Ratcliff*, 399 F.Supp. 760, 766-67 (E.D.Wis.1975). The injury which Donnelley speaks of, however, is

[6] Section 1391(e) did broaden the place where a federal official or agency could be sued in one minor respect. Under the previous venue provisions, 28 U.S.C. §§ 1391(a) and (b), an action was permitted only where *all* the defendant officials resided, which generally required that the suit be filed in the District of Columbia, *see* note 4, *supra*. Under § 1391(e), suit is now permitted where *any* federal defendant resides. This change, however, did not alter the definition of residence as the district court believed. Rather, it merely gives a plaintiff a choice which he did not have previously, *i.e.*, when he sues both an agency *eo nomine* and a local governmental official, he can file his action either in the District of Columbia or the judicial district where the local official resides. This change does not affect the outcome of this case as both the Commission and the five individual commissioners are all residents of the District of Columbia.

[7] The Commission disputes this claim and asserts that the publishing policies are made in New York at Donnelley's principal place of business. The district court made no finding of fact on this issue.

[8] We express no view as to the proper approach for determining the place where the claim arose as resolution of that question is not necessary here.

not the injury which comprises part of its present cause of action; rather it is the impact which may result at the end of the administrative proceeding. To base a venue determination on the possibility of future administrative ruling approaches the question backwards.[9] We hold therefore that the cause of action did not arise in the Northern District of Illinois.

C

[6] Donnelley's final argument is that venue is properly laid under § 1391(e)(4), which provides that suit may be brought where "the plaintiff resides if no real property is involved in the action." Although Donnelley is incorporated in Delaware and has its principal place of business in New York, it argues that it resides in the Northern District of Illinois because the *Official Airline Guide* is published in the Chicago metropolitan area.

Because § 1391(e)(4) does not define residence we must look for guidance to § 1391(c), which defines corporate residence for purposes of venue as follows:

> A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes.

Donnelley argues that this section applies to corporate plaintiffs as it does to corporate defendants, and that since it is doing business in the Chicago area, venue is properly laid in this case under § 1391(e)(4). The Commission, on the other hand, argues that § 1391(c) applies only to corporate defendants and that a corporate plaintiff such as Donnelly may sue only in the place of its incorporation. We believe the latter construction to be the better view.[10]

Donnelly first argues that to read § 1391(c) to refer only to defendant corporations would be to ascribe to Congress the anomalous in-

[9] In support of its argument Donnelley cites *Brotherhood of Locomotive Engineers* v. *Denver & R.G.W.R.R.*, 290 F.Supp. 612, 616 (D.Colo.1968), *aff'd on other grounds*, 411 F.2d 1115 (10th Cir. 1969). Because the plaintiff in that case resided in Colorado, venue was held proper under § 1391(e)(4). In dicta, the court also noted that the cause of action arose in the district because the "impact and operation of any such action [by the National Mediation Board, headquartered in the District of Columbia] would be felt in this district . . .." *Id.* at 616. We decline to follow this view for the reasons noted above.

[10] This question was raised in *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 156 n. 20, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967), but the Supreme Court refused to resolve the issue until the courts of appeals had an opportunity to address it. The five courts of appeals which have considered the question have been uniform in concluding that a corporate plaintiff may maintain an action under § 1391(e)(4) only in the state of incorporation. *Data Disc Inc.* v. *Systems Technology Associates, Inc.*, 557 F.2d 1280, 1289 (9th Cir. 1977); *American Cyanamid Co.* v. *Hammond Lead Products, Inc.*, 495 F.2d 1183, 1184-85 (3d Cir. 1974); *Manchester Modes, Inc.* v. *Schuman*, 426 F.2d 629, 630 (2d Cir. 1970); *Carter-Beveridge Drilling Co., Inc.* v. *Hughes*, 323 F.2d 417 (5th Cir. 1963) (*per curiam*); *Robert E. Lee & Co.* v. *Veatch*, 301 F.2d 434, 438 (4th Cir. 1961), *cert. denied*, 371 U.S. 813, 83 S.Ct. 23, 9 L.Ed.2d 55 (1962). *See also D.C. Electronics, Inc.* v. *Schlesinger*, 368 F.Supp. 1029, 1032 (N.D.Ill. 1974).

tent of treating defendant corporations and plaintiff corporations differently. In support it cites *Upjohn Co.* v. *Finch*, 303 F.Supp. 241, 254 (W.D.Mich. 1969), wherein the court stated:

> To hold otherwise would create a paradoxical interpretation of § 1391(c) which would result in having corporate residence mean one thing to a corporate plaintiff and something entirely different to a corporate defendant. Nothing has been brought to the attention of this Court which would suggest that the Congress intended such a result.

We disagree with such reasoning for there are fundamental policy reasons for treating plaintiff and defendant corporations differently.

Historically, venue has been geared primarily to the convenience of the defendant rather than that of the plaintiff since it is the defendant who is being brought into court. Thus, for example, until 1966 a plaintiff in a non-diversity case had no choice of venue; he was restricted to the place where the defendant or all the defendants resided.[11]

More important is recognition of the underlying purpose of the enactment of § 1391(c). The Supreme Court, in an "unbroken line of decisions," declared that a corporation's residence for venue purposes was in the state of incorporation. *See, e.g., Suttle* v. *Reich Brothers Co.*, 333 U.S. 163, 166, 68 S.Ct. 587, 92 L.Ed. 614 (1948). This interpretation had the harsh result of forcing plaintiffs to litigate their claims in remote districts. Section 1391(c) was enacted in 1948 to deny to corporations the ability to inflict injury or breach contracts and then force upon the injured parties the burden of finding where the business was incorporated and maintaining an action there. The provision "is quite obviously a response to a general conviction that it was 'intolerable if the traditional concepts of "residence" and "presence" kept a corporation from being sued wherever it was creating liabilities.'" *Transmirra Products Corp.* v. *Fourco Glass Co.*, 233tF,2d 885, 887 (2d Cir. 1956).

Finally, to allow a corporation to sue in any judicial district in which it maintains an office—no matter how unrelated the district may be to the controversy at issue—would encourage forum shopping and would favor corporate plaintiffs over individual plaintiffs who have but one residence. *See Manchester Modes, Inc.* v. *Schuman*, 426 F.2d 629, 632 (2d Cir. 1970).

Donnelley also argues that to interpret § 1391(e)(4) as limiting the residence of a corporate plaintiff to the place of incorporation con-

[11] In 1966, 28 U.S.C. § 1391(b) was amended to include venue in the district in which the claim arose. Act of Nov. 2, 1966, Pub.L. No. 89-714, 80 Stat. 1111. Even today, however, residence of the plaintiffs is not a basis for venue in nondiversity cases under § 1391(b).

flicts with the congressional purposes of § 1391(e), namely, to expand the number of judicial districts in which federal defendants can be sued. We believe Donnelley has again misconstrued the manner in which Congress chose to broaden the venue provision. It did so by providing for three new bases of venue; there is no legislative history to suppose that Congress also sought to redefine established concepts of residence.

We hold therefore that the residence of a corporate plaintiff for purposes of § 1391(e)(4) is restricted to the place of incorporation. As Donnelley is incorporated in Delaware, venue was improperly laid in the Northern District of Illinois.

We note that under our reading of § 1391(e)(4) a corporate plaintiff may still locate venue wherever any defendant resides, the claim arose, any realty involved in the suit is located, or any corporate plaintiff is incorporated, or any individual co-plaintiff resides. These options include every district even remotely related to a legal controversy.

Because we hold that the district court did not have venue over this action, we do not reach the other arguments raised on appeal. The order appealed from is vacated and the district court is directed to transfer this cause pursuant to 28 U.S.C. § 1406(a) to the United States District Court for the District of Columbia.

FEDERAL TRADE COMMISSION v. GLENN W. TURNER*

Civ. A. No. 78-164-ORL-CIV-R. F.T.C. File No. 99-395

(United States District Court, Middle District of Florida, August 2, 1978)

In denying FTC petition for enforcement of its subpoena requiring respondent to disclose evidence of his assets, court held that the FTC Act does not specifically provide for an investigation of assets prior to filing a consumer redress action.

Before JOHN A. REED, JR., *District Judge.*

MEMORANDUM OF DECISION

On 10 July 1978 the court heard oral argument on the petition filed herein by the Federal Trade Commission to enforce an administrative subpoena directed to the Respondent, Glenn W. Turner.

Under Section 19(a)(2) of the Federal Trade Commission Improvement Act—Public Law 93-637—the Federal Trade Commission was empowered to institute a civil action for damages if:

> . . . any person . . . engages in any unfair or deceptive act or practice . . . with respect to which the Commission has issued a final cease and desist order which is applicable to such person . . .

Here a cease and desist order has been issued which applies to the Respondent. It does not, however, appear to be final because of the pendency of an appeal to the Court of Appeals for the District of Columbia Circuit. Nevertheless, the Petitioner has issued a subpoena requiring the Respondent to disclose evidence of his assets. The alleged purpose for the subpoena is to enable the Petitioner to determine whether or not a civil suit for damages under Section 19(a)(2) would be of any practical value. The Respondent's failure to comply with the subpoena led to the present enforcement proceeding.

The question is whether or not the Trade Commission Act authorizes the issuance of an administrative subpoena for the purpose above stated. The relevant investigative powers of the Commission seem to be provided in 15 U.S.C. § 46. In part, Section 46 provides:

> The Commission shall also have power—
>
> (a) To gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices, and management of any person . . . engaged in or whose business affects commerce . . ..

*Not otherwise reported.

With respect to the Commission's subpoena power, 15 U.S.C. § 49 provides:

> . . . the Commission shall have power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation. . . .

Nowhere in the Federal Trade Commission Act is there any specific grant of authority to the Commission to inquire into a subject's wealth prior to instituting a civil damage action against him. To infer the existence of such a power from the provisions of Section 46 or Section 49 above would be unwarranted from the plain meaning of the language therein used.

Section 43 of Title 15, United States Code, provides:

> . . . The Commission may, by one or more of its members, or by such examiners as it may designate, prosecute any inquiry necessary to its duties in any part of the United States.

If it can be said that the institution of a civil action for damages is a "duty" of the Commission, it can hardly be said that a pre-judgment inquiry into the wealth of the potential defendant is "necessary" to the performance of that duty. Had Congress intended to vest such an extraordinary power in the Federal Trade Commission, it is reasonable to assume that it would have done so in unmistakable terms.

For the foregoing reasons, enforcement of the subpoena will be denied.

DONE AND ORDERED in Chambers at Orlando, Florida, this 2nd day of August, 1978.

ORDER

For the reasons stated in the Memorandum of Decision filed herein on even date herewith, it is

ORDERED that the petition filed herein is hereby denied and dismissed.

DONE AND ORDERED in Chambers at Orlando, Florida, this 2nd day of August, 1978.

BRISTOL-MYERS COMPANY *v.* FEDERAL TRADE COMMISSION et al.*

No. 77-1275. F.T.C. Docket No. 8917.

(United States Court of Appeals, District of Columbia Circuit, August 22, 1978, *As Amended on Denial of Rehearing* October 19, 1978)

1. DOCUMENTS REFLECTING ADVISORY OPINIONS, RECOMMENDATIONS AND DELIBERATIONS IN FORMULATING GOVERNMENTAL DECISIONS AND POLICIES ARE GENERALLY PROTECTED BY FOIA EXEMPTION OF PREDECISIONAL INTERAGENCY AND INTRAAGENCY MEMORANDA.

   [19] Protection afforded by exemption of the Freedom of Information Act permitting the withholding of predecisional interagency or intraagency memos not available to party other than agency in litigation with agency extends generally to documents reflecting advisory opinions, recommendations and deliberations comprising part of process by which governmental decisions and policies are formulated.

2. FOR FOIA PURPOSES, AN ACTION TAKEN BY A RESPONSIBLE DECISION MAKER THAT DISPOSES OF A MATTER BEFORE THE COMMISSION IS "FINAL," AND, PURSUANT TO PRINCIPLE THAT ONLY PREDECISIONAL AGENCY MEMORANDA MAY BE WITHHELD, ANY ACCOMPANYING EXPLANATION OF DECISION MAKER'S REASONING CONSTITUTES A DISCLOSABLE "FINAL OPINION."

   Action taken by responsible decision maker in an agency's decision-making process which has practical effect of disposing of a matter before the agency is "final" for purposes of the Freedom of Information Act and if such action is accompanied by written explanation of decision maker's reasoning, that explanation constitutes a "final opinion" and must be disclosed under principle that interagency or intraagency memorandums may be withheld only if they are predecisional.

3. AN FTC "DECISION IN A CASE" TO TERMINATE ADJUDICATORY PROCEEDING OR EXCLUDE A CHARGE FROM ITS COMPLAINT IS AN "ADJUDICATION OF THE WHOLE OR A PART OF A MATTER" BEFORE THE COMMISSION, AND A MEMORANDUM EXPLAINING AGENCY'S REASONS FOR THE DECISION WOULD BE SUBJECT TO INDEXING AND FOIA DISCLOSURE AS A "FINAL OPINION."

   A decision by the Federal Trade Commission to terminate an adjudicatory proceeding or not to include a proposed charge in a complaint is a "decision in a case" and constitutes an "adjudication of the whole or a part of a matter" before the agency and if Commission prepared a memorandum explaining the reasons for the decision, it would qualify as a "final opinion" and be subject to indexing and disclosure under the Freedom of Information Act.

4. SECTIONS OF FOIA PERMITTING DISCLOSURE OF ADOPTED STATEMENTS OF AGENCY POLICY AND INTERPRETATIONS AND INSTRUCTIONS TO STAFF THAT AFFECT A MEMBER OF THE PUBLIC WOULD EMBRACE A STATEMENT OF REASONS ACCOMPANYING A "FINAL FTC DECISION.

   If decision of the Federal Trade Commission to terminate adjudicatory proceeding or not to include a proposed charge in a complaint were accompanied by a statement of reasons, statement would be covered under sections of

* Reported in 598 F.2d 18 (1978).

Freedom of Information Act permitting disclosure of statements of policy and interpretations which have been adopted by the agency or instructions to staff that affect a member of the public.

5. FOR FOIA PURPOSES, NEGATIVE DECISIONS REACHED BY AGENCY IN COURSE OF AN ADJUDICATION ARE NOT PRELIMINARY ONES.

Negative decisions reached by agency in course of an adjudication are not preliminary ones for purposes of the Freedom of Information Act.

6. EVEN IF FOIA OBLIGATED THE COMMISSION TO PREPARE MEMORANDA EXPLAINING ITS DECISIONS, TO DISCLOSE AGENCY'S PREDECISIONAL MEMORANDA BECAUSE THEY MIGHT CONTAIN REASONS FOR FTC ACTION WOULD CONSTITUTE A VIOLATION OF FOIA EXEMPTION OF PREDECISIONAL INTERAGENCY AND INTRAAGENCY MEMORANDA.

The Federal Trade Commission was not required under the Freedom of Information Act to prepare memoranda explaining its decision, notwithstanding that predecisional memoranda prepared by the Commission might contain reasons underlying the Commission's action and that disclosure of this memoranda would violate exemption applicable to interagency or intraagency predecisional memoranda.

7. DISTRICT COURT SHOULD HAVE ASCERTAINED WHETHER MINUTES AT ISSUE CONTAINED "FINAL OPINION," AGENCY-ADOPTED STATEMENTS OF POLICY AND INTERPRETATION, OR INSTRUCTIONS TO STAFF THAT WOULD AFFECT A MEMBER OF THE PUBLIC, BEFORE APPLYING FOIA EXEMPTION OF PREDECISIONAL AGENCY MEMORANDA TO THOSE MINUTES.

Before applying Freedom of Information Act exemption permitting withholding of interagency or intraagency predecisional memorandum to chronological minutes in administrative enforcement proceedings concerning certain advertising claims, district court should have ascertained whether those minutes contained "policy determinations" or whether any information in minutes qualified as "final opinions * * * made in the adjudication of cases" or matters which would qualify as "final opinion," statements of policy and interpretation [20] which had been adopted by the agency, or instructions to staff that would affect a member of the public.

8. IF COMMISSION ADOPTED OR INCORPORATED BY REFERENCE REASONS CONTAINED IN STAFF DOCUMENTS PREPARED FOR ITS CONSIDERATION IN ADMINISTRATIVE ENFORCEMENT PROCEEDING, DOCUMENTS WOULD LOSE THEIR PREDECISIONAL CHARACTER, AND THUS, THEIR FOIA IMMUNITY FROM DISCLOSURE.

If the Federal Trade Commission had adopted or incorporated by reference reasons contained in any of documents prepared by staff or individual commissioner for its consideration in administrative enforcement proceeding concerning certain advertising claims, documents would lose their predecisional character and fall outside scope of exemption permitting withholding of interagency or intraagency predecisional memorandums.

9. AN AGENCY DOCUMENT DOES NOT QUALIFY AS AN FOIA EXEMPTED "WORK PRODUCT" MERELY BECAUSE IT WAS PREPARED BY AN ATTORNEY.

Mere fact that an agency document was prepared by an attorney does not necessarily qualify it as a "work product" so as to be exempt from disclosure under the Freedom of Information Act.

10. FOIA'S WORK PRODUCT EXEMPTION CLEARLY EMBRACES MEMORANDA CONTAINING ATTORNEY'S THEORY OF CASE AND LITIGATION STRATEGY PREPARED BY ATTORNEY IN CONTEMPLATION OF LITIGATION.

Whatever outer boundaries of attorney's work product exemption under the Freedom of Information Act are, rule clearly applies to memoranda prepared by attorney in contemplation of litigation which sets forth the attorney's theory of case and his litigation strategy.

11. FTC COUNSEL'S MEMORANDA CONTAINING REPORTS OF INTERVIEWS AND CORRESPONDENCE WITH EXPERT CONSULTANTS, PREPARED FOR THE COMMISSION SPECIFICALLLY FOR LITIGATION PURPOSES ARE EXEMPT FROM FOIA DISCLOSURE.

Interview reports of expert witnesses and correspondence between staff and consultants as prepared by the Federal Trade Commission in course of investigation and administrative enforcement proceedings concerning certain advertising claims were exempt from disclosure under the Freedom of Information Act attorney work product exemption where memoranda were prepared by staff counsel for the Commission and they were prepared specifically for purposes of subject proceeding.

12. ALTHOUGH LEGAL THEORIES OR TRIAL STRATEGY WERE NOT REVEALED IN FTC COUNSEL'S PRETRIAL DISCOVERY INTERVIEWS OF EXPERT WITNESSES, FOIA ATTORNEY WORK PRODUCT EXEMPTION WOULD APPLY TO COUNSEL'S NOTES TAKEN DURING THOSE INTERVIEWS AND PREPARED FOR THE COMMISSION IN CONTEMPLATION OF LITIGATION.

Although interviews of complaint counsel's expert witnesses conducted by attorneys for respondent in administrative enforcement proceeding before the Federal Trade Commission did not themselves reveal legal theories or trial strategy of Commission counsel, notes taken by Commission counsel during pretrial discovery interviews of complaint counsel's expert witnesses were prepared by Commission counsel in contemplation of litigation and, thus, would be subject to Freedom of Information Act attorney work product exemption.

13. NEED FOR INFORMATION IS NOT GROUND FOR FOIA TO DISTINGUISH BETWEEN LITIGANTS.

The Freedom of Information Act does not distinguish between litigants on basis of their need for information.

14. AGENCY MEMORANDA INCORPORATED BY REFERENCE IN NONEXEMPT FINAL OPINION LOSE PROTECTION OF FOIA ATTORNEY WORK PRODUCT EXEMPTION.

Agency memoranda lose protection of attorney work product exemption under Freedom of Information Act to extent that they have been incorporated by reference in nonexempt final opinion.

15. *IN CAMERA* INSPECTION WAS UNNECESSARY, WHERE WITHHELD DOCUMENTS APPEARED TO HAVE ORIGINALLY BEEN PRODUCT OR PREDECISIONAL, OR BOTH, AND FTC HAD RESPONDED IN GOOD FAITH TO FOIA REQUEST BY SUPPLYING DETAILED DESCRIPTIONS FOR MOST DOCUMENTS AND JUSTIFICATIONS FOR NONSEGREGABILITY CLAIMS.

Where the Federal Trade Commission responded to request for information under the Freedom of Information Act in good faith and for most part it supplied detailed descriptions of documents and justifications, including hypothetical illustrations, for the claim that segregation of nonexempt portions was impracticable, where most of documents were said to be exempt on

both work product and "deliberative process" privilege grounds and where documents appeared originally to have been either work product or predecisional or both, in camera inspection of documents was not necessary.

16. CASE WOULD BE REMANDED FOR FURTHER ELUCIDATION WHERE COURT WAS UNABLE TO DETERMINE WHETHER EXEMPTION OF INVESTIGATORY RECORDS COMPILED FOR LAW ENFORCEMENT PROCEEDING WAS APPLICABLE SINCE ITS ONLY KNOWLEDGE OF MINUTES AT ISSUE WAS THAT THEY WERE REFLECTIONS OF COMMISSION'S DELIBERATIONS.

Where only knowledge of contents of minutes of the Federal Trade Commission as taken in administrative enforcement proceeding concerning certain advertising claims was that they were reflections of the Commission's deliberations, court could not determine whether exemption protecting investigatory records compiled for law en[21]forcement purposes would be applicable and, thus, case would be remanded for further elucidation.

Manufacturer sought disclosure of certain documents prepared by the Federal Trade Commisssion in course of investigation and administrative enforcement proceedings concerning advertising claims made by manufacturers of nonprescription, internal analgesic drugs. The United States District Court for the District of Columbia, John Lewis Smith, Jr., District Judge, found information contained in documents was protected by exemptions under the Freedom of Information Act and manufacturer appealed. The Court of Appeals, Bazelon, Circuit Judge, held that: (1) a decision by the Federal Trade Commission to terminate an adjudicatory proceeding or not to include a proposed charge in a complaint is a "decision in a case" and constitutes an "adjudication of the whole or a part of a matter" before the agency and if Commission prepared a memorandum explaining the reasons for the decision, it would qualify as a "final opinion" and be subject to indexing and disclosure under the Freedom of Information Act; (2) if decision of the Federal Trade Commission to terminate adjudicatory proceeding or not to include a proposed charge in a complaint were accompanied by a statement of reasons, statement would be covered under sections of Freedom of Information Act permitting disclosure of statements of policy and interpretations which have been adopted by the agency or instructions to staff that affect a member of the public, and (3) before applying Freedom of Information Act exemption permitting withholding of interagency or intraagency predecisional memorandum to chronological minutes in administrative enforcement proceedings concerning certain advertising claims, district court should have ascertained whether those minutes contained "policy determinations" or whether any information in minutes qualified as "final opinions * * * made in the adjudication of cases" or matters which would qualify as "final opinion," statements of policy and interpretation which had been adopted by the agency, or instructions to staff that would affect a member of the public.

Remanded.

(Syllabus, with substituted captions, taken from 598 F.2d 18.)

MACKINNON, *Circuit Judge,* dissented with opinion.

Appeal from the United States District Court for the District of Columbia (D.C. Civil 76-1364).

Gilbert H. Weil, New York City, with whom *Bruce R. Hafner,* New York City, was on brief, for appellant.

Paul Blankenstein, Atty., Dept. of Justice, Washington, D.C., with whom *Earl J. Silbert,* U.S. Atty., *Barbara Allen Babcock,* Asst. Atty. Gen., and *Leonard Schaitman,* Atty., Dept. of Justice, Washington, D.C., were on brief, for appellee.

Also *Jeffrey Axelrad, Lynne K. Zusman,* Atty., Dept. of Justice and *Jerald D. Cummins,* Atty., F.T.C., Washington, D.C., entered appearances for appellee.

Before BAZELON, MCGOWAN and MACKINNON, *Circuit Judges.*
Opinion for the Court filed by BAZELON, *Circuit Judge.*
Dissenting opinion filed by MACKINNON, *Circuit Judge.*

BAZELON, *Circuit Judge.*

Bristol-Myers Company seeks disclosure of certain documents prepared by the Federal Trade Commission (FTC or Commission) in the course of an investigation and administrative enforcement proceeding concerning advertising claims made by manufacturers of nonprescription, internal analgesic drugs. The district court found that the information contained in these documents is protected by exemptions 5 and 7(A) of the Freedom of Information Act, 5 U.S.C. §§ 552(b)(5) and (7)(A) (1976), and granted summary judgment for the FTC. We remand to the district court for further proceedings.

I. BACKGROUND

Bristol-Myers is presently contesting a complaint issued by the FTC in February, 1973, charging that the company has falsely advertised Bufferin, Excedrin, and Excedrin P.M. in violation of sections 5 and 12 of the Federal Trade Commission Act, 15 U.S.C. §§ 45 and 52.[1] Pursuant to the Commission's regulations pertaining to discovery,[2] Bristol-Myers has been able to gain access to various studies prepared by or for the FTC concerning consumer awareness and perceptions of analgesics products, and to scientific studies possessed by the FTC concerning the efficacy, speed of action, safety, and side effects of these products. Joint Appendix (J.A.) 121a-125a. Additionally, through resort to FOIA,[3] the company has obtained from the Commission 3,160 documents, comprising 31,742 pages, relevant to the charges contained in the complaint. J.A. 114a.

[1] F.T.C. Docket No. 8917. The Commission has also instituted similar proceedings against other producers of analgesics, American Home Products, Inc., F.T.C. Docket No. 8918, and Sterling Drugs, Inc., F.T.C. Docket No. 8919.

[2] 16 C.F.R. § 3.31 *et seq.* Under these regulations, Bristol-Myers applied to the presiding administrative law judge (ALJ) for a subpoena directing the Commission to produce documents relating to the charges. The ALJ's opinion granting the subpoena in part and denying it in part appears in the Joint Appendix (J.A.) at 121a-125a. The Commission denied a motion by Bristol-Myers for an interlocutory appeal from the ALJ's order. J.A. 206a-207a.

[3] *See generally* 16 C.F.R. § 4.11, the Commission's regulation pertaining to FOIA requests.

In July, 1976, Bristol-Myers brought suit in the United States District Court for the District of Columbia for disclosure of 1300 documents withheld by the Commission. J.A. 10a-12a. During the course of the district court proceeding, however, the company withdrew its request for a substantial portion of these materials. J.A. 3a-4a, 267a, 283a. Still in dispute are 327 documents, comprising 765 pages. J.A. 4a.

In support of its motion for summary judgment, the Commission filed an indexed description of the information appearing in these 327 documents. J.A. 208a-223a. The index divides the documents into nine cate[22]gories,[4] summarized by the Commission as follows:

CATEGORY A. Inter-agency memoranda.

CATEGORY B. 100 "Blue Minutes," i. e., reflections of the Commission's deliberations.

CATEGORY C. Documents from Commissioners.

CATEGORY D. Interview reports (of expert witnesses).

CATEGORY E. Correspondence between staff and consultants.

CATEGORY F. One letter discussing a witness' dissatisfaction with his compensation.

CATEGORY G. Drafts and comments (of proposed rules, notice orders, and complaints).

CATEGORY H. Staff written reports of interviews by counsel.

CATEGORY I. Memoranda from files of U.S. Pharmocopeial Convention.

The Commission also filed the affidavit of James H. Skiles, an attorney in the FTC's Bureau of Consumer Protection who has been assigned to the adjudicative proceeding against Bristol-Myers. J.A. 112a-120a. The affidavit explains the Commission's justifications for invoking exemptions 5 and 7(A) of FOIA.

It was on the basis of the index and accompanying affidavit that the district court granted summary judgment for the Commission.

II. ANALYSIS

The record establishes that the Commission voluntarily disclosed the overwhelming majority of the documents requested. Its index and affidavit, on the whole, describe with particularity the nature and contents of the documents withheld, as required by our decision in *Vaughn* v. *Rosen*, 157 U.S.App.D.C. 340, 484 F.2d 820 (1973), *cert. denied*, 415 U.S. 977, 94 S.Ct. 1564, 39 L.Ed.2d 873 (1974).

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[3] *See generally* 16 C.F.R. § 4.11, the Commission's regulation pertaining to FOIA requests.

[4] Brief for the Commission at 10 n.10. Bristol-Myers has withdrawn its request for disclosure of the documents indexed in Categories F and I. Hence only seven of the categories are in dispute.

The withheld materials can be divided into two broad classes for purposes of analysis. The documents indexed in four Categories, A, B, C, and G, are all said to have been prepared by staff, individual Commissioners, or the Commission itself during the Commission's process of deciding whether and how to proceed against analgesics manufacturers. Brief for the Commission at 32. The documents indexed in three Categories, D, E, and H, are all said to have been prepared by staff counsel and to contain communications, including interviews, with expert consultants contacted by the Commission during the analgesics investigation. *Id.*

A. *"Predecisional" Memoranda*

The district court found that the documents indexed in Categories A, B, C, and G are shielded from disclosure by exemption 5. This exemption permits an agency to withhold "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5).

The Commission contends that this result was correct insofar as Categories A, C and G are concerned because these memoranda are communications between and among FTC staff and Commissioners containing "advice, recommendations, opinions, analyses of potential trial or rule-making strategy and evaluations of evidence." J.A. 114a.[5] Relying on the Supreme Court's decisions in *Renegotiation Board* v. *Grumman Aircraft,* 421 U.S. 168, 95 S.Ct. 1491, 44 L.Ed.2d 57 (1965) and *NLRB* v. *Sears, Roe*[23]*buck & Co.,* 421 U.S. 132, 95 S.Ct. 1504, 44 L.Ed.2d 29 (1965), as well as our decision in *Sterling Drug, Inc.* v. *FTC,* 146 U.S.App.D.C. 237, 450 F.2d 698 (1971), the Commission argues that these documents are thus "predecisional" in character and must be protected in order to "prevent injury to the quality of agency decisions." Brief for the Commission at 19-20 (*quoting Sears, supra,* 421 U.S. at 151, 95 S.Ct. 1516). The Commission contends that the documents listed in Category B—its so-called "Blue Minutes"—are similarly exempt as deliberative material under our decision in *Ash Grove Cement Co.* v. *FTC,* 167 U.S.App.D.C. 249, 250, 511 F.2d 815, 816, *rehearing denied,* 171 U.S.App.D.C. 285, 519 F.2d 934 (1975).

Bristol-Myers, on the other hand, urges that the documents indexed in these Categories may be subject to the affirmative disclosure and indexing requirements of FOIA contained in 5 U.S.C. § 552(a)(2). These requirements apply to "final opinions . . . made in the adjudica-

[5] The Commission also contends that a substantial portion of this material is exempt as attorney "work product." In view of our disposition of the case, however, we need not decide this question. *See* notes 11, and 23, *infra* and accompanying text.

tion of cases," § 552(a)(2)(A), to "statements of policy and interpretations which have been adopted by the agency," § 552(a)(2)(B), and to "instructions to staff that affect a member of the public," § 552(a)(2)(C).

The interplay of exemption 5 with the affirmative provisions of FOIA on which Bristol-Myers relies presents a comparatively new issue, which the Supreme Court discussed in *NLRB* v. *Sears, Roebuck & Co., supra.* Before examining that case, however, we discuss briefly the development of principles governing exemption 5.

[1] It is well-established that, among other purposes, exemption 5 was intended by Congress to protect "the consultative functions of government . . .." *Sears, supra,* 421 U.S. at 149, 95 S.Ct. 1491 (*quoting Kaiser Aluminum & Chemical Corp.* v. *United States,* 157 F.Supp. 939, 946, 141 Ct.Cl. 38, 49 (1958). *See also EPA* v. *Mink,* 410 U.S. 73, 86, 93 S.Ct. 827, 35 L.Ed.2d 119 (1973). S.Rep.No.813, 89th Cong., 2d Sess., 9 (1966) (hereinafter S.Rep. No.813); H.R.Rep. No.1497, 89th Cong., 2d Sess. 10 (1966) (hereinafter H.R.Rep. No. 1497), U.S. Code Cong. & Admin. News 1966, p. 2418. Such protection extends generally to documents "reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." *Id.* 421 U.S. at 150, 95 S.Ct. at 1516 (*quoting Carl Zeiss Stiftung* v. *V.E.B. Carl Zeiss, Jena,* 40 F.R.D. 318, 324 (D.D.C.1966), *aff'd per curiam,* 128 U.S.App.D.C. 10, 384 F.2d 979, *cert. denied,* 389 U.S. 952, 88 S.Ct. 334, 19 L.Ed.2d 361 (1967). Such protection was deemed necessary by Congress, the Senate Report explains, because "it would be impossible to have any frank discussion of legal or policy matters in writing if all such writings were to be subjected to public scrutiny." S.Rep.No.813, *supra,* at 9. *See also United States* v. *Nixon,* 418 U.S. 683, 705, 94 S.Ct. 3090, 3106, 41 L.Ed.2d 1039 (1974) ("Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decision-making process.").

In seeking to implement this congressional mandate, courts have established the general principle that predecisional memoranda are privileged,[6] while postdecisional memoranda—communications designed to explain a decision already made—are not.[7]

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[6] *See, e. g., Sears, supra,* 421 U.S. at 151, 95 S.Ct. 1504; *Boeing Airplane Co.* v. *Coggeshall,* 108 U.S.App.D.C. 106, 280 F.2d 654 (1960); *Zacher* v. *United States,* 227 F.2d 219 (8th Cir. 1955), *cert. denied,* 350 U.S. 993, 76 S.Ct. 542, 100 L.Ed. 858 (1956); *Clark* v. *Pearson,* 238 F.Supp. 495 (D.D.C.1965); *O'Keefe* v. *Boeing Co.,* 38 F.R.D. 329 (S.D.N.Y.1965); *Walled Lake Door Co.* v. *United States,* 31 F.R.D. 258 (E.D.Mich.1962).

[7] *See, e. g., Sears, supra,* 421 U.S. at 152, 95 S.Ct. 1504; *Bannercraft Clothing Co.* v. *Renegotiation Board,* 151 U.S.App.D.C. 174, 466 F.2d 345 (1972), *rev'd on other grounds,* 415 U.S. 1, 94 S.Ct. 1028, 39 L.Ed.2d 123 (1974); *Sterling Drug, Inc.* v. *FTC,* 146 U.S.App.D.C. 237, 450 F.2d 698 (1971); *GSA* v. *Benson,* 415 F.2d 878 (9th Cir. 1969).

The Supreme Court recognized in *Sears,* however, that "the line between predecisisonal documents and postdecisional docu[24]ments may not always be a bright one. Indeed, even the prototype of the postdecisional document—the 'final opinion'—serves the dual function of explaining the decision just made and providing guides for decisions of similar or analogous cases in the future." 421 U.S. at 152 n. 19, 95 S.Ct. at 1517.

Two aspects of the Court's holding in *Sears* are material to our analysis here. First, the Court ruled that Advice and Appeals Memoranda prepared by the General Counsel for the National Labor Relations Board (NLRB) deciding *not* to issue a complaint must be disclosed under FOIA.[8] Although the NLRB urged that these memoranda were predecisional, the Court held exemption 5 inapplicable. It based this conclusion both on the affirmative disclosure and indexing requirements contained in 5 U.S.C. § 552(a)(2) and on considerations of congressional policy underlying FOIA. In the context of the practical realities of the NLRB's decision-making process, the Court reasoned, Advice and Appeals Memoranda directing that a charge be dismissed constitute "final opinions" made in the "adjudication of cases."[9] Such documents are therefore covered, irrespective of any predecisional character, by 5 U.S.C. § 552(a)(2)(A). 421 U.S. at 157-159, 95 S.Ct. 1504. The court refused to construe exemption 5 to protect documents covered by this provision, since this "affirmative portion of the Act . . . represents a strong congressional aversion to 'secret [agency] law' . . . and represents an affirmative congressional purpose to require disclosure of documents which have 'the force and effect of law,'"[10] 421 U.S. at 153, 95 S.Ct. at 1518 (citations omitted).

Second, the Court held in *Sears* that a memorandum prepared prior to the decision to dismiss a charge will lose its predecisional

[8] The Court also, held, however, that the NLRB was *not* required to disclose those Advice and Appeals Memoranda deciding affirmatively *to* issue a complaint. 421 U.S. at 160, 95 S.Ct. 1504. The function of these various documents in the context of the NLRB's decision-making process is discussed at *id.*, 138-142, and 155-160, 95 S.Ct. 1504.

[9] These documents, the Court found, "represent an explanation . . . of a legal or policy decision already adopted by the General Counsel." 421 U.S. at 155, 95 S.Ct. at 1519. As such, they "effect as 'final' a 'disposition' . . . as an administrative decision can . . .." *Id.* Moreover, the Court observed, "the General Counsel's decisions not to file complaints together with the Advice and Appeals Memoranda explaining them, are precisely the kind of agency law in which the public is so vitally interested and which Congress sought to prevent the agency from keeping secret." *Id.* at 155-156, 95 S.Ct. at 1519.

[10] The Court expressed "reluctance" about its decision not to require disclosure of Advice and Appeals Memoranda deciding affirmatively *to* issue a complaint, *see* note 8, *supra,* because such documents also "have many of the characteristics of the documents described in 5 U.S.C. § 552(a)(2)." 421 U.S. at 160, 95 S.Ct. at 1521. The Court indicated that such documents may thus contain "secret law." *Id.*

This result was necessary, the Court reasoned, "only because the decisionmaker—the General Counsel—must become a litigating party to the case with respect to which he has made his decision." *Id.* The attorney "work product" doctrine therefore precluded disclosure. *Id. See generally* Part B *infra.*

Whether the work-product rule would bar disclosure in a case where, as here, the decisionmaker is the agency itself, and is thus not a litigating party upon issuance of a complaint, is an open question. We need not decide it since Bristol-Myers does not seek disclosure of memoranda explaining the Commission's reasons for instituting the adjudication that is presently pending.

character if the agency chooses expressly to adopt or incorporate it by reference in a "final opinion."[11] *Id.* at 161, 95 S.Ct. at 1521. The Court explained:

> The probability that an agency employee will be inhibited from freely advising a decisionmaker for fear that his advice, if adopted, will become public is slight. First, when adopted, the reasoning becomes that of agency and becomes its responsibility to defend. Second, agency employees will generally be encouraged rather than discouraged by public know[25]edge that their policy suggestions have been adopted by the agency. Moreover, the public interest in knowing the reasons for a policy actually adopted by an agency supports . . . [disclosure].

Id. (emphasis in original).

Bristol-Myers contends that certain decisions reached by the Commission during the course of the analgesics investigation constitute "final action by the agency" under *Sears* and that those memoranda indexed in Categories A, B, C, and G which explain the Commission's reasons for such action cannot now be regarded as predecisional. Brief for Appellant at 5-10, 14-19. Specifically, Bristol-Myers seeks disclosure of any documents containing the Commission's reasons for (a) choosing not to proceed by rulemaking against the over-the-counter analgesics industry as a whole, (b) terminating a prior adjudicatory proceeding against Bristol-Myers, and (c) choosing not to include certain proposed allegations in the complaint presently pending.[12]

[2] The district court held, however, that *Sears* has no application in this case because the Supreme Court "carefully confined [its] holding . . . to the unique structure of the [NLRB]." District Court Opinion at 3 n. 6, J.A. 4a. We disagree. It appears to us that the Court meant in *Sears* to establish as a general principle that action taken by the responsible decisionmaker in an agency's decision-making process which has the practical effect of disposing of a matter before the agency is "final" for purposes of FOIA. If such action is accompanied by a written explanation of the decisionmaker's reasoning, that explanation constitutes a "final opinion" and must be disclosed. Thus, the Court explained its analysis in the language of the Administrative Procedure Act generally:

> The decision [by General Counsel] to dismiss a charge is a decision in a "case" and constitutes an "adjudication"; an "adjudication" is defined under the Administrative

[11] This rule applies even if the memorandum at issue was prepared by an attorney and might otherwise be exempted as work product. *Sears* makes clear that exemption 5 has an application to memoranda expressly adopted or incorporated by reference in a nonexempt "final opinion." 421 U.S. at 161, 95 S.Ct. 1504.

[12] The record is unclear as to when the Commission actually made these decisions and what exactly they involved. It appears that the Commission originally intended in 1967 to proceed against the analgesics industry through rulemaking. J.A. 19a. Also, Bristol-Myers was charged with violation of the Federal Trade Commission Act in a prior adjudicatory proceeding, F.T.C. Docket No. 8319. J.A. 19a. The record does not reveal whether hearings were ever actually commenced in connection with either of these proceedings. In any event, the Commission appears to concede that it made these decisions and also chose not to include certain proposed charges in the complaint presently pending. Brief for Comm. at 28-30, 34.

Procedure Act . . . as "agency process for the formulation of an order," 5 U.S.C. § 551(7); an "order" is defined as "the whole or a part of a *final disposition*, whether affirmative [or] negative . . . of an agency in a matter . . .," 5 U.S.C. § 551(6) (emphasis added); . . . Since an Advice or Appeals Memorandum explains the reasons for the "final disposition" it plainly qualifies as an "opinion"; and falls within 5 U.S.C. § 552(a)(2)(A).

Id. at 158-159, 95 S.Ct. at 1520.

[3-5] In the FTC's administrative process, the Commission itself is responsible for decisions analogous to those made in *Sears* by General Counsel for the NLRB. The Commission's brief, at 30, makes this clear: "The Commission is invested by law with the authority to issue complaints (15 U.S.C. [§] 45), and while the Commission has delegated authority to various subordinate units, like the Bureau of Consumer Protection, the Commission retains final authority as to whether any complaint shall issue and the content of any issued complaint. 16 C.F.R. [§§] 0.16, 3.11. Similarly, the Commission must authorize any rulemaking action." In this case, then, a decision by the Commission itself to terminate an adjudicatory proceeding or not to include a proposed charge in a complaint is a "decision in a 'case' and constitutes an 'adjudication' . . . [of] 'the whole or a part of . . . a matter'" before the agency. If the Commission prepared a memorandum explaining the reasons for the decision, it would qualify as a "final opinion" and be subject to indexing and disclosure under 5 U.S.C. § 552(a)(2)(A). Similarly, a decision not to [26] proceed by rulemaking would also be a "final" one for purpose of FOIA. If such a decision were accompanied by a statement of reasons, the statement would be covered under 5 U.S.C. § 552(a)(2)(B) ("statements of policy and interpretations which have been adopted by the agency") or § 552(a)(2)(C) ("instructions to staff that affect a member of the public").[13]

[13] The Commission contends that these decisions were "merely preliminary determinations which, if the current administrative proceedings run their course, will ripen into final decisions which will then comprise the 'working law' of the agency." Brief for Comm. at 29. Accordingly, it is asserted, any memoranda explaining these decisions cannot be regarded as "final opinions . . . made in the adjudication of cases." *Id.* at 28-29.

We think that *Sears* establishes that "negative" decisions reached by an agency in the course of an adjudication are not preliminary ones for purposes of FOIA. The Court expressly held that the decision to dismiss a charge, if accompanied by a statement of reasons, "represent[s] the 'law' of the agency." 421 U.S. at 158, 95 S.Ct. at 1520. In so doing, as indicated above, it referenced language in the Administrative Procedure Act, 5 U.S.C. §§ 551(6) and (7), providing that an "adjudication" is the "final disposition" of any "part" of a "matter" before the agency. Indeed, the Court appears to have rejected General Counsel's argument "that the Appeals Memoranda [deciding affirmatively *to* issue a complaint] represent only the first step in litigation and [therefore] are not final; . . ." 421 U.S. at 157, 95 S.Ct. at 1519. As noted earlier, *see* note 10, *supra*, the Court recognized that such memoranda "have many of the characteristics of ['final opinions'] . . . [,]" *Id.* at 160, 95 S.Ct. at 1521, and declined to order the NLRB to disclose them "only because" of work-product considerations. *Id.* A question left undecided by *Sears* is whether the work-product doctrine would bar disclosure even of affirmative memoranda in a case where, as here, the decision-maker is not a litigating party upon issuance of a complaint.

Although *Sears* did not involve a decision not to proceed by rulemaking, we think the Court's reasoning applies by analogy. Such a decision is one of "policy," 5 U.S.C. § 552(a)(2)(B), and one that "affects the public," *id.* § 552(a)(2)(C), and the public would be "vitally interested" in knowing the Commission's reasons. *Cf. Sears, supra*, 421 U.S. at 156, 95 S.Ct. 1504.

[6] It is unclear on this record, however, whether the Commission itself ever prepared any memoranda explaining its basis for these decisions. As noted earlier, the Commission says that documents written by staff and individual Commissioners (Categories A, C, and G) were prepared for purposes of discussion. And the so-called "Blue Minutes" (Category B) are said to be merely "reflections of the Commission's deliberations." The Commission was not required under FOIA to prepare memoranda explaining its decisions. *Renegotiation Board* v. *Grumman Aircraft*, 421 U.S. 168, 192, 95 S.Ct. 1491, 44 L.Ed.2d 57 (1975); *Mead Data Central, Inc.* v. *United States Department of the Air Force (Mead Data II)*, 188 U.S.App.D.C. 51 at 54, 575 F.2d 932 at 935 (1978). And if it chose not do so, we could not determine whether the reasons underlying its decision were identical to those in the documents prepared by staff and individual Commissioners for its consideration. *Grumman, supra*, 421 U.S. at 192, 95 S.Ct. 1491; *Mead Data II, supra*, 188 U.S.App.D.C. at 55, 575 F.2d at 936; *Kent Corp.* v. *NLRB*, 530 F.2d 610 at 619-620; *Sterling Drug, Inc.* v. *FTC, supra*, 146 U.S.App.D.C. at 244-245, 450 F.2d at 705-708. At best, Bristol-Myers could argue that these documents *might* contain the reasons underlying the Commission's actions. In such circumstances the Supreme Court has made it clear that disclosure would violate exemption by impinging on the agency's predecisional processes. *Grumman, supra*, 421 U.S. at 192, 95 S.Ct. 1491.

[7] We are troubled, however, by the ambiguity in the record concerning the nature and contents of the Commission's "Blue Minutes." The index provides only the following description of Category B: "Over-100 so-called 'blue minutes' or reflections of the Commission's deliberations." J.A. 216a. Evidently, the Commission simply assumed that these minutes are per se protected under our decision in *Ash Grove Cement Co.* v. *FTC*, 167 U.S.App.D.C. 249, 511 F.2d 815, *rehearing denied*, 171 U.S.App.D.C. 285, 519 F.2d 934 (1975), and therefore decided that additional detail was unnecessary. At oral argument, counsel for the Commission indicated that this was the case and acknowledged that the minutes[27] could have been described with greater particularity if that were required.

We think that both the Commission and the district court[14] read too much into our decision in *Ash Grove*. In that case, two types of "minutes" were at issue. First, the "Blue Minutes" were described there as "staff directives," 167 U.S.App.D.C. at 250, 511 F.2d at 816, not as "reflections of the Commission's deliberations."[15] These "staff

[14] The district court also appears to have read *Ash Grove* to mean that the Commission's "Blue Minutes" are per se exempted from FOIA's mandatory disclosure provisions. District Court Opinion at 4, J.A. 5a.

[15] We should note that although the evidence of record in this case establishes only that the "Blue Minutes" are "reflections of the Commission's deliberations," J.A. 216a, the Commission's Brief, at 30, describes them as "staff directives reflecting the Commission's deliberations." Although we base our decision on the record evidence, it bears mention that this inconsistency manifests that not merely the contents but also the purpose of the so-called "Blue Minutes" is in need of considerable clarification. *See also* note 16 *infra* and accompanying text.

directives" were held to be protected by exemptions 5 and 7. *Id.* Whether such directives may be withheld after *Sears* is a question we need not decide.[16] Second, the Commission had withheld its so-called "chronological minutes," described as

> accounts of the Commission's executive meetings and conferences . . . the deliberations of the Commission such as exchange of opinions between individual Commissioners, their recommendations, motions, discussions and statements. They also contain staff recommendations and involve pending cases, internal reorganization procedures, personnel actions, *policy determinations* and generally reflect the Commission's decision-making process.

Id. 167 U.S.App.D.C. at 251, 511 F.2d at 817 (emphasis supplied by the court). The court held that the one-paragraph description of the chronological minutes was conclusory under the standards established by our prior decisions[17] and that the portions of these minutes which contain policy determinations were subject to disclosure. It directed the district court on remand to examine at least a representative portion of the minutes *in camera* before determining whether or not exemption 5 applied. *Id.* 167 U.S.App.D.C. at 252, 511 F.2d at 818.

It would appear that the "Blue Minutes" at issue in this case are kin to the "chronological minutes" involved in *Ash Grove.* Thus, before applying exemption 5 to the Blue Minutes, the district court should have ascertained whether they contain "policy determinations" within the meaning of *Ash Grove.*[18] The district court did not address this question, and certainly could not have resolved it on the basis of the description supplied by the Commission.

[8] The district court should also have addressed the question whether any information in the "Blue Minutes" qualifies as "final opinions . . . made in the adju[28]dication of cases" within the meaning of *Sears.* If so, such opinions are subject not only to disclosure but also to the affirmative indexing requirement contained in 5 U.S.C. § 552(a)(2)(A). Similarly, it must be determined whether the minutes contain matters covered by §§ 552(a)(2)(B) and (C).[19] Moreover, the possibility that the "Blue Minutes" may contain

[16] The court in *Ash Grove* did not address the question whether such "directives" might, for example, be subject to disclosure and indexing under 5 U.S.C. § 552(a)(2)(C) as "instructions to staff that affect a member of the public; . . ."

[17] *See, e.g., Pacific Architects and Engineers, Inc. v. Renegotiation Board,* 164 U.S.App.D.C. 276, 505 F.2d 383 (1974); *Cuneo v. Schlesinger,* 157 U.S.App.D.C. 368, 484 F.2d 1086 (1973), *cert. denied sub nom. Rosen v. Vaughn,* 415 U.S. 977, 94 S.Ct. 1564, 39 L.Ed.2d 873 (1974); *Vaughn v. Rosen,* 157 U.S.App.D.C. 340, 484 F.2d 820 (1973), *cert. denied,* 415 U.S. 977, 94 S.Ct. 1564, 39 L.Ed.2d 873 (1974).

[18] Both the index and affidavit are silent with respect to this question. This will not suffice because the government is required under FOIA to prove that it is entitled to the exemption claimed. 5 U.S.C. § 552(a)(4)(B). *Compare Renegotiation Board v. Grumman Aircraft,* 421 U.S. 168, 95 S.Ct. 1491, 44 L.Ed.2d 57 (1965), the principal case on which the Commission relies, where there was testimony concerning whether particular documents contained the reasons underlying the Board's decisions. *Id.* at 185-186, 189, 95 S.Ct. 1491.

Also, we should note that it may be argued on the basis of *Sears* that the "policy determinations" discussed in *Ash Grove* are subject not merely to disclosure but also to the affirmative indexing requirement contained in 5 U.S.C. § 552(a)(2). *See Ash Grove Cement Co. v. F.T.C.,* 171 U.S.App.D.C. 285, 286, 519 F.2d 934, 935 (1975) (denying petition for rehearing).

[19] *See* note 13 *supra* and accompanying text.

policy matters raises the question whether the Commission has adopted or incorporated by reference the reasoning contained in any of the documents prepared by staff or individual Commissioners for its consideration.[20] If so, these documents, too, would lose their predecisional character and fall outside the scope of exemption 5.[21]

B. *Memoranda Reflecting Communications with Expert Consultants*

The district court found that the documents listed in Categories D, E, and H are also shielded from disclosure by exemption 5, but on a different rationale. The court held that these documents are exempted as attorney "work product."

It is well-established that exemption 5 was designed also to protect the work product of agency attorneys. *NLRB* v. *Sears, Roebuck & Co., supra,* 421 U.S. at 154-155, 95 S.Ct. 1504. *See* also S.Rep.No.813, *supra,* at 2.

The fundamental principles underlying contemporary understanding of the work product doctrine derive from *Hickman* v. *Taylor,* 329 U.S. 495, 67 S.Ct. 385, 90 L.Ed. 1645 (1947). There the Court said, in pertinent part:

> In performing his various duties, however, it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper presentation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. . . . This work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways—aptly though roughly termed by the Circuit Court of Appeals in this case as the "work product of the lawyer." Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. . . . Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial.

Id. at 511, 67 S.Ct. at 393.

[9, 10] We do not suggest, of course, that the mere fact that an agency document was prepared by an attorney necessarily qualifies it

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[20] There is no evidence in the record concerning whether the Commission has adopted, ratified, or incorporated by reference in the "Blue Minutes" the reasoning in any of the other documents at issue. *Compare Grumman, supra* note 18, 421 U.S. at 185-186, 95 S.Ct. at 1501: "Chairman Hartwig testified:

> '[When the recommendation clearance of the Regional Board comes up on the Board agenda, the Board simply approves or disapproves the clearance. It does not adopt any of the memoranda that are before it. It does not ratify or adopt any of these staff memoranda. It simply, in the exercise of its judgment, says it is a clearance or it isn't a clearance. And there is no Board-adopted document which you could call an opinion.' "

Such detailed information about the agency's decision-making process is essential, in our view, to a fair determination of the agency's exemption claims. *See also Sears, supra,* 421 U.S. at 138-142, 95 S.Ct. 150.

[21] *See* note 11 *supra* and accompanying text.

as "work product." "The executive branch of our government employs an uncountable and ever-growing number of attorneys, and [exemption 5 of the FOIA] can hardly be understood as protecting everything they put on paper." *Kent Corp.* v. *NLRB*, 530 F.2d 612, 623 (5th Cir. 1976). Also, we recognize that this doctrine is not without its difficulties and many exceptions. *See generally* 8 Wright & Miller, Federal Practice and Procedures §§ 2021-2028 (1976). As the Supreme [29] Court has said, however, "[w]hatever the outer boundaries of the attorney's work-product rule are, the rule clearly applies to memoranda prepared by an attorney in contemplation of litigation which sets forth the attorney's theory of the case and his litigation strategy." *NLRB* v. *Sears, Roebuck & Co., supra*, 421 U.S. at 154, 95 S.Ct. at 1518.

[11] The record establishes that the documents listed in two categories, D and E, fall well within the rule. First, as noted earlier, these memoranda were prepared by staff counsel for the Commission. J.A. 116a-117a. Second, they were prepared specifically for purposes of the analgesics cases. *Id.* Indeed, the index reveals that a substantial number of these documents were prepared by staff counsel after the complaint was issued against Bristol-Myers. J.A. 218a-220a. Finally, the affidavit states: "[T]he documents described in Categories D and E go to the very heart of complaint counsel's cases because they contain staff [counsel's] non-verbatim reports of interviews or conversations which, questions asked of, responses given by and correspondence with our expert consultants. In addition, they contain discussions as to the strengths and weaknesses of certain tests, studies and theories which both support and conceivably work against the Commission's allegations, as well as the staff's analysis of a particular expert's expertise." J.A. 116a-117a.

[12] The documents in the third category, Category H, present a slightly different case, but we think the district court was nevertheless correct in concluding that they, too, are work product. These memoranda are notes taken by Commission counsel during "pre-trial discovery interviews of complaint counsel's expert witnesses conducted by attorneys for . . . American Home," another respondent in the analgesics cases. J.A. 119a. Since attorneys for the Commission posed no questions during these interviews, it cannot be said that the *interviews* themselves reveal the legal theories or trial strategy of Commission counsel. It is clear, however, that the *notes* were prepared by Commission counsel in contemplation of litigation, and we think the district court could properly accept the Commission's position that disclosure of such notes would reveal counsel's "mental impressions" and evaluations of the testimony given.

[13] Bristol-Myers appears to concede that the work-product rule would ordinarily apply here but urges that we should take account of the company's particular need for the information these documents contain. FOIA, however, does not distinguish between litigants on the basis of their need for information. The House Report indicates that exemption 5 was intended to permit agencies to withhold intra-agency memoranda which would not "routinely be disclosed" in private litigation.[22] H.R.Rep.No.1497, *supra*, at 10. *See also Sears, supra*, 421 U.S. at 149 n. 16, 95 S.Ct. 1504; *Sterling Drug, Inc.* v. *FTC*, 146 U.S.App.D.C. 244, 250-251, 450 F.2d 698, 704-705 (1971).

[14, 15] Although we thus agree with the district court that the documents in these categories are work product, it does not necessarily follow that they may be withheld. *Sears* makes it clear that such memoranda lose the protection of exemption 5 to the extent that they have been incorporated by reference in a nonexempt "final opinion."[23] 421 U.S. at 154, 161, 95 S.Ct. 1504. [30]

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[22] Also, we note that if Bristol-Myers does in fact require this information to prepare or strengthen its defense, our decision will not preclude the company from obtaining it. The ALJ, in refusing to disclose these documents under the FTC's discovery rules, *see* note 2, *supra*, stated that he would "entertain renewed request[s] for any specific document being excluded from production . . . if and when a need therefor for purposes of cross-examination or defense preparation can be clearly demonstrated." J.A. 124a.

[23] *See* note 11 *supra* and accompanying text.

Bristol-Myers' final contention is that whether or not exemption 5 applies, the district court should have examined the documents at issue *in camera* to determine whether any portion of the materials consists of nonexempt, "reasonably segregable" information. Certainly, it has long been the rule in this Circuit that non-exempt factual information in a document must be disclosed unless it is inextricably intertwined with exempt material. *See, e. g., Mead Data Central, Inc.* v. *Dept. of the Air Force (Mead Data I)*, 184 U.S.App.D.C. 350, 368, 566 F.2d 242, 260 (1977); *Washington Research Project, Inc.* v. *Dept. of HEW*, 164 U.S.App.D.C. 169, 180, 504 F.2d 238, 249 (1974); *Bristol-Myers* v. *FTC*, 138 U.S.App.D.C. 22, 26, 424 F.2d 935, 939, *cert. denied*, 400 U.S. 824, 91 S.Ct. 46, 27 L.Ed.2d 52 (1970). In 1974, Congress expressly incorporated this requirement into FOIA, *see* P.L.No.93-502, § 2, 88 Stat. 1561, which now provides that "[a]ny reasonably segregable portion of a record shall be provided . . . after deletion of the portions which are exempt." 5 U.S.C. § 552(b) (1976). The district court was plainly aware of this requirement, and relied on the representations made by the Commission's affidavit that segregation of any factual portions of these materials would impinge on both the Commission's predecisional processes and its attorneys' thought processes. Affidavit of John Skiles, J.A. 114a. The Court found that segregation could not be accomplished without " 'compromising the private remainder of the documents.' " District Court Opinion at 4, J.A. 5a (*quoting EPA* v. *Mink*, 410 U.S. 73, 89, 93 S.Ct. 827, 35 L.Ed.2d 119 (1973).

We are satisfied that, with the possible exception of Category B, the so-called "Blue Minutes," the district court's decision to forego *in camera* inspection in this case was not an abuse of its discretion. First, as the court recognized, the Commission evidently responded to the FOIA request in good faith, and for the most part it supplied detailed descriptions of the documents and justifications, including hypothetical illustrations, for its claim that segregation was impracticable. J.A. 112a-120a, 208a-223a. *See, e.g., Mead Data I, supra*, 184 U.S.App.D.C. at 370 n. 59, 566 F.2d at 262 n. 59, *Vaughn* v. *Rosen, supra*, 157 U.S.App.D.C. at 345-346, 484 F.2d at 825-826. Second, most of the documents in Categories A, C, D, F, G, and H were said to be exempt on both work-product and "deliberative process" privilege grounds. As we have indicated, these documents do appear originally to have been either work-product, or predecisional or both, and we remand only to determine whether they have lost their exempt character by reason of incorporation by reference in the "Blue Minutes." In such circumstances, we think the district court could properly rely on the agency's representations that segregation of factual matters could not be reasonably accomplished. Even apart from the problem of impinging on the agency's predecisional processes, courts recognize that it is especially difficult to segregate facts and yet give effect to the exemption in work-product cases, since counsel's consideration and weighing of the facts is very much a part of his tactical and strategic analysis. *See Deering Milliken, Inc.* v. *Irving*, 548 F.2d 1131, 1137-1138 (4th Cir. 1977); *Kent Corp.* v. *NLRB*, 530 F.2d 612, 623-624 (5th Cir. 1976).

C. *Exemption 7(A)*

[16] There would be no need for further proceedings, of course, if "Blue Minutes" and any memoranda they may incorporate by reference would be protected in any event by exemption 7(A). This is the Commission's alternate contention, resolved for the most part against it in district court[24] and pressed again on appeal. We note that the Supreme Court left open in *Sears* the question whether exemption 7 applies to Advice and Appeals Memoranda deciding not to issue a complaint. 421 U.S. at 162-163, 95 S.Ct. 1504. The Court did rule, however, that a document protected by exemption 7 does not become disclosable solely because it is incorporated by reference in a "final opinion." *Id.* at 166, 95 S.Ct. 1504.

Without greater knowledge of the contents of the Blue Minutes and the purposes they are designed to serve, we cannot determine whether exemption 7(A) applies. This exemption, as amended in 1974,[25] protects "investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings . . .." Although minutes or "reflections" of the Commission's deliberations would appear to be something other than [31] "investigatory records,"[26] we are reluctant to make this determination without more elucidation.

Similarly, there would be no point in our speculating about whether any documents that might be incorporated by reference in the Blue Minutes would qualify for nondisclosure under this exemption. Even assuming such documents were "investigatory records," the Commission would be required to demonstrate that release of the particular information they contain would "interfere with enforcement proceedings."[27] Such determinations should be made by the district court in the first instance on the basis of evidence supplied by the Commission.

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[24] The district court found that "[t]he Commission['s] index repeatedly invokes Exemption 7A in situations in which the exemption is not even arguably available." District Court Opinion at 3, J.A. 4a. It held that this exemption did not apply to Category A ("intra-agency memoranda"), but did apply to the documents in Categories D ("Interview reports of expert witnesses") and H ("Staff written reports of interviews by counsel"). It made no specific mention of exemption 7(A) in discussing the remaining categories.

[25] Pub.L. 93-502, 88 Stat. 1563. Previously, this exemption shielded "investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency." 5 U.S.C. § 552(b)(7)(1970).

[26] The post-amendment cases cited by the Commission as protecting "investigatory record" generally involve statements by potential witnesses in law enforcement proceedings. *See, e. g., Climax Molybdenum Co.* v. *NLRB*, 539 F.2d 63 (10th Cir. 1976); *Title Guarantee Co.* v. *NLRB*, 534 F.2d 484 (2d Cir.), *cert. denied*, 429 U.S. 834, 97 S.Ct. 98, 50 L.Ed.2d 99 (1976).

[27] *See generally NLRB* v. *Robbins Tire*, 437 U.S. 214, 98 S.Ct. 2311, 57 L.Ed.2d 159 (1978). Judge MacKinnon reads *Robbins Tire* to suggest that the sweep of Exemption 7(A) is as broad as an agency's own discovery rules in an enforcement proceeding. Dissent at 4. Our disposition of this case makes it unnecessary to determine the precise scope of Exemption 7(A) as applied to the Blue Minutes. However, we would point out that Judge MacKinnon's view was adopted by only three members of the Supreme Court in *Robbins Tire* (concurring op. of Stevens, J., 437 U.S. at 243, 98 S.Ct. 2311) and that the majority's decision focused primarily on the peculiar danger of witness intimidation in NLRB proceedings, which supports the requisite finding that disclosure would "interfere with enforcement proceedings." *See id.* at 240-241, 98 S.Ct. 2311; *Title Guarantee Co.* v. *NLRB*, *supra*, 534 F.2d at 492.

III. CONCLUSION

In accordance with our decision in *Ash Grove, supra*, the case must be remanded to the district court for *in camera* inspection of at least a representative sample of the "Blue Minutes" (Category B) to determine whether any portion of these minutes is disclosable under the principles outlined in this opinion, and, if so, for findings as to whether any other documents at issue are disclosable by reason of incorporation by reference. The district court may, if so advised, take additional evidence to determine whether exemption 7(A) applies to these materials.

So ordered.

MACKINNON, *Circuit Judge*, dissenting:

Since I do not perceive any significant fault in the district court's disposition of this matter, I would affirm the judgment under review.

I. THE DOCUMENTS IN QUESTION

The 327 documents in dispute, comprising some 765 pages (J.A. 4a n.2), are divided into nine categories (Maj.Op. at 21 of 598 F.2d). *Category A* contains 17 documents, all of which are *intra-agency memoranda* relating to pending charges against Bristol-Myers, the companion cases to those charges, or previous investigations of similar cases (J.A. 114a-15a, 208a-16a). According to the index, these memoranda were prepared by staff attorneys or the heads of an FTC office or Bureau for submission to the Commission, individual Commissioners, or other FTC officials, and are recommendations or opinions pertaining to various aspects of the enforcement proceeding (J.A. 208a). *Category B* consists of over 100 *"blue minutes,"* which are staff directives from the Commission reflecting on trial strategy and other aspects of the Commission's deliberations (J.A. 115a, 216a). *Category C* contains *four memoranda from individual Commissioners* to the full Commission discussing such matters as weaknesses of the case, proposed revisions in the complaint, the relative merits of proceeding by adjudication as opposed to rulemaking, and other reflections on strategy and theories in the conduct of the enforcement proceeding (J.A. 115a-16a, 216a). *Category D* consists of approximately 150 non-verbatim *reports of interviews of expert witnesses by agency complaint counsel* (J.A. 116a-18a, 217a). [32]

Category E contains three *letters between agency complaint counsel and expert consultants.* These letters are follow-up letters to particular experts (J.A. 218a-20a). *Category F* referred to one letter discussing the dissatisfaction of a witness with his compensation; plaintiff's request for this document was withdrawn (J.A. 282a). *Category G* consists of three documents, which are *early drafts of the complaint and orders* issued in the proceeding (J.A. 221a). *Category H* consists of *notes taken by Commission attorneys of interviews of*

two experts in connection with a companion case (J.A. 222a). *Category I* consisted of memoranda from files of the U.S. Pharmocopeial Convention; this request was withdrawn (J.A. 282a).

The seven categories remaining in controversy can be divided into two broad classes for purposes of analysis: (1) *Categories A, B, C, and G* consist of documents prepared by Commission staff, individual Commissioners, or the Commission itself during the process of deciding *how to proceed, if at all,* against analgesic manufacturers (*see* Maj.Op. at 22 of 598 F.2d); and (2) *Categories D, E, and H* consist of documents prepared by staff counsel which contain reports and notes on communications, including interviews, with expert consultants contacted by the agency during the investigation (Maj.Op. at 22 of 598 F.2d).

II. EXEMPTION 7(A)

It is my view that Exemption 7(A) protects these documents from disclosure. The Commission pressed this argument before the district court, but its argument there was largely rejected.[1] The Commission argues Exemption 7(A) again on appeal. The majority note that the Supreme Court left open in *NLRB* v. *Sears, Roebuck & Co.,* 421 U.S. 132, 95 S.Ct. 1504, 44 L.Ed.2d (1975), the question of whether Exemption 7 applies to Advice and Appeals Memoranda deciding *not* to issue a complaint, 421 U.S. 162-65, 95 S.Ct. 1504.[2] The majority also note that the Court did not rule that a document protected by Exemption 7 "does not become disclosable solely because it is referred to in a 'final opinion.'" 421 U.S. at 166, 95 S.Ct. at 1524.[3] In my view, the proper scope of Exemption 7 for this situation was established in *NLRB* v. *Robbins Tire and Rubber Co.,* 437 U.S. 214, 98 S.Ct. 2311, 57 L.Ed.2d 159 (1978).

In *Robbins Tire,* respondent had been charged in an unfair labor practice complaint issued by the Acting Regional Director of the NLRB with having committed numerous violations of § 8(a)(1) of the National Labor Relations Act. A hearing on the complaint was scheduled for late April, 1976. On March 31, 1976, respondent wrote to the Acting Regional Director, and requested pursuant to the FOIA that he make available for inspection and copying, at least seven days prior to the hearing, copies of all potential witnesses' statements collected during the Board's investigation. The request was denied on April 2 on various grounds, particularly Exemption

[1] Exemption 7(A) was applied to documents in Categories D and H by the district court (J.A. 6a). It was held expressly inapplicable to the documents in Category A (J.A. 4a). In a footnote to the discussion of Category A, the district court stated that "[t]he Commission index repeatedly invokes Exemption 7A in situations in which the exemption is not even arguably available" (J.A. 4a n.5). The exemption was not discussed with respect to categories other than A, D, and H. *Compare* Maj.Op. at n.27.

[2] Maj.Op. at 30 of 598 F.2d.

[3] *Id.*

7(A).[4] An action was thereafter filed in the dis[33]trict court, which held that Exemption 7(A) did not apply;[5] the Fifth Circuit affirmed.[6]

In determining whether the Board had met its burden of demonstrating that disclosure of the potential witnesses' statements "would interfere with enforcement proceedings," 5 U.S.C. § 552(b)(7), the Court relied primarily on the fact that the NLRB had historically provided little prehearing discovery[7] and that failing to recognize the applicability of the exemption would "change the substantive discovery rules."[8] The Court stated:

> Our reluctance to override a long tradition of agency discovery, based on nothing more than an amendment to a statute designed to deal with a wholly different problem, is strengthened by our conclusion that the dangers posed by premature release of the statements sought here would involve precisely the kind of "interference with enforcement proceedings" that Exemption 7(A) was designed to avoid.

98 S.Ct. at 2325. In my view, the logic which underlies *Robbins Tire*—specifically, that the FOIA does not authorize the production of NLRB records that could not be obtained through the agency's normal discovery process during a law enforcement proceeding—applies to any law enforcement proceeding before any agency. It is my position that the FOIA does not authorize discovery greater than that available under the rules normally applicable to a law enforcement proceeding. If the statute authorized more discovery, it would "interfere" with the proceeding, and this is not what Congress intended.[9]

The facts of this case demonstrate that it is precisely the situation where the proposition which emerges from *Robbins Tire* should be ap-

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[4] 5 U.S.C. § 552(b) provides:

This section does not apply to matters that are—

* * * * * * *

(7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings . . .

[5] 92 L.R.R.M. 2586 (N.D.Ala. 1976) 57 L.Ed.2d 159 (1976).

[6] *Robbins Tire & Rubber Co.* v. *NLRB*, 563 F.2d 724 (5th Cir. 1977).

[7] 98 S.Ct. at 2324.

[8] 98 S.Ct. at 2324.

[9] *See* 98 S.Ct. at 2327. (Stevens, J., joined by Burger, C. J. and Rehnquist, J.):

> The "act of meddling in" a process is one of Webster's accepted definitions of the word "interference." A statute that authorized discovery greater than that available under the rules normally applicable to an enforcement proceeding would "interfere" with the proceeding in that sense. The Court quite correctly holds that the Freedom of Information Act does not authorize any such interference in Labor Board enforcement proceedings. Its rational applies equally to any enforcement proceeding. On that understanding, I join the opinion.

It was unnecessary to go this far to decide the narrow issue presented by *Robbins Tire*, but three Justices explicitly did so. It may be that, if presented with a case more like this one, this position will be adopted by more members of the Court. *Compare* Maj.Op. at n.27. *See also Renegotiation Board v. Bannercraft Clothing Co.*, 415 U.S. 1, 24, 94 S.Ct. 1028, 1040, 39 L.Ed.2d 123 (1974):

> Interference with the agency proceeding opens the way to the use of the FOIA as a tool of discovery . . . over and beyond that provided by the regulations issued by the Renegotiation Board for its proceedings . . . Discovery for litigation purposes is not an expressly indicated purpose of the Act.

plied. On February 23, 1973, the Commissioners of the FTC caused a complaint to be issued against Bristol-Myers for violations of sections 5 and 12 of the FTC Act, 15 U.S.C. §§ 45, 52 (J.A. 226a-251a). Plaintiff elected to contest the charges, and an adjudicative proceeding was commenced before an administrative law judge ("ALJ") (J.A. 112a). As part of its discovery, plaintiff in March, 1976, applied to the ALJ for the issuance of four subpoenas to the FTC or its employees, through which plaintiff sought discovery of a wide variety of FTC documents relating to the pending administrative proceeding (J.A. 129a-62a). On March 31, 1976, the ALJ directed the agency to make available to plaintiff most of the documents sought but he denied plaintiff access to certain other documents on the ground that such material was privileged and not discoverable (J.A. 121a-25a, 135a-38a). In so ruling, the ALJ expressly relied upon the Commission's discovery rules, 16 C.F.R. §§ 3.31-.39, and its construction thereof. Plaintiff unsuccessfully sought reconsidera[34]tion by the ALJ of his discovery ruling, and the Commission declined plaintiff's request to accept an interlocutory appeal from the ruling (J.A. 126a-38a, 184a-204a, 206a).

Having failed to persuade the ALJ to reconsider his discovery ruling, plaintiff on May 6, 1976 (while its petition for an interlocutory appeal from the discovery ruling was pending before the Commission) made a broad FOIA request for virtually all material relating to the FTC's investigation of and proceedings against analgesic producers (J.A. 18a-20a). On May 11, plaintiff modified this request to exclude, *inter alia*, any records previously supplied it in discovery before the ALJ (J.A. 21a).

These records were not authorized to be disclosed by the normal discovery rules. Furthermore, they were "investigatory records compiled for law enforcement purposes." These records resulted from and reflected the investigative effort of the Commision in enforcing the Federal Trade Commission Act.[10] The 1974 amendment was not intended to be "a radical departure from existing case law under the Freedom of Information Act." Freedom of Information Act Source Book, S.Doc. 93-82, Subcommittee on Administrative Practice and Procedure, Senate Judiciary Comm., 93d Cong., 2d Sess. (1974), (hereafter "Source Book"), at 334 (Sen. Hart). The intent Congress had in 1966 to protect the Government's case from harm by the "premature release of evidence or information" continued through the 1974 amendment. *Id.*, at 333 (Sen. Hart).

Thus, these records were within the purview of Exemption 7(A), and their disclosure was not authorized by the normal discovery

[10] In my view, the term "records" in Exemption 7 has the same intrinsic meaning as the term "records" in the remainder of the FOIA, that is, as a general matter, *any* recorded information in the possession of or owned by the federal government, whatever the content or format.

rules. Since I do not believe that the FOIA authorizes discovery greater than that made available by the agency's own discovery rules normally applicable in the law enforcement proceeding, I would hold that the documents in question need not be disclosed to plaintiff.

In my view, the legislative history of Exemption 7(A) clearly bears out such conclusion. As originally enacted in 1966, Exemption 7 removed from the coverage of the FOIA

> investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency.

5 U.S.C. § 552(b)(7) (1970). A basic concern of Exemption 7 was that law enforcement agencies should be allowed to keep certain records confidential, lest they be hindered in their investigations or placed at a disadvantage when it was time to present their case. Congress clearly wanted to prevent "harm [to] the Government's case in court," S.Rep.No. 813, 89th Cong., 2d Sess. (1965), *reprinted in* Source Book, at 44, by not allowing "any earlier or greater access to the government's case *than he would have directly in such litigation or proceeding.*" H.R.Rep. No. 1497, 89th Cong., 2d Sess. (1966), *reprinted in* Source Book, at 32 (emphasis added). In short, Exemption 7, as enacted in 1966, was not intended to disclose more records than an individual would be entitled to by the applicable discovery rules of the agency in the law enforcement proceeding.

However, this court in a series of cases[11] ruled that the court in an FOIA suit has no duty to inquire into whether nondisclosure of investigatory files would serve any of the purposes underlying Exemption 7. Therefore, in 1974, Congress amended Exemption 7 because it disapproved of the approach taken in those cases. The amending legislation, which affected FOIA in several respects, as reported out of the committees [35] did not recommend any changes in Exemption 7; the amendment instead resulted from a proposal on the floor of the Senate made by Senator Hart during Senate debate.

Senator Hart's amendment accomplished two things: (1) it substituted the word "records" for "files," thereby making it clear that courts were required to consider the nature of the particular document as to which the exemption was claimed, Source Book at 451; (2) it explicitly enumerated the purposes and objectives of the exemption, thereby requiring reviewing courts to "look[ ] to the reasons" for allowing the withholding of investigatory records before making their decisions. *Id.*, at 334. Thus, as stated in *Robbins Tire*, the thrust of the 1974 amendment to Exemption 7 was to make clear that it did not "endlessly protect material simply because it was in an investigatory file." 98 S.Ct. at 2321. In fact, the Court stated that the Hart amendment was identical in the respects there relevant to a pro-

[11] *Weisberg* v. *U.S. Dept. of Justice*, 160 U.S.App.D.C. 71, 489 F.2d 1195 (1973), *cert. denied*, 416 U.S. 993, 94 S.Ct. 2405, 40 L.Ed.2d 772, (1974); *Aspin* v. *Department of Defense*, 150 U.S.App.D.C. 231, 491 F.2d 24 (1973); *Ditlow* v. *Brinegar*, 161 U.S.App.D.C. 154, 494 F.2d 1073 (1974); *Center for National Policy Review on Race and Urban Issues* v. *Weinberger*, 163 U.S.App.D.C. 368, 502 F.2d 370 (1974).

posal submitted during the hearings by the Administrative Law Division of the American Bar Association, one description of which the Court said suggested

> that *the release of information in investigatory files prior to the completion of an actual, contemplated enforcement proceeding was precisely the kind of interference that Congress continued to want to protect against.*

98 S.Ct. at 2322 (emphasis added). Senator Hart stated specifically that Exemption 7(A) would apply

> whenever the Government's case in court—a concrete prospective law enforcement proceeding—would be harmed by the premature release of evidence or information.

Source Book, at 333. I think it reasonable to conclude that the 1974 amendment sought to preserve the purpose of the original 1966 enactment, and not to permit the disclosure of more records than an individual would be entitled to by the discovery rules applicable to the agency in the law enforcement proceeding.

The language of Exemption 7(A) takes on even greater force when it is considered that the enforcement proceeding here is *still going on.* This is a valid distinction which the Supreme Court has recognized can be considered in deciding whether Exemption 7(A) should be applied. In discussing the meaning of this exemption in light of the legislative history, the Court stated in *Robbins Tire:*

> Although much of the debate on this amendment [to Exemption 7] focused on the problems of access to "closed files," two of the four D.C. Circuit cases involved *files in still-pending investigations. Ditlow* v. *Brinegar, supra; Center for National Policy Review of Race & Urban Issues* v. *Weinberger, supra.* But we do not understand the thrust of the Board's argument to depend solely on its file being "open." Instead, the Board points to the particular nature of these proceedings and the imminence of an actual adjudicatory proceeding on the charge. Since Senators Kennedy and Hart carefully explained the amendment's purpose as being to eliminate a "wooden" and overly literal approach to the language of the exemption, *we do not read their reference to these two cases to mean that consideration of the pendency of an as-yet-unresolved charge to which the material sought relates is a factor that cannot be considered.*

98 S.Ct. at 2320 n.10 (emphasis added). *Robbins Tire* approved several circuit court decisions, *see* 98 S.Ct. at 2315 n.5, some of which noted the importance of the pendency of a law enforcement proceeding. In *Title Guarantee Co.* v. *NLRB,* 534 F.2d 484 (2d Cir. 1976), the court stated:

> We cannot envisage that Congress intended to overrule the line of cases dealing with labor board discovery in pending enforcement proceedings by virtue of a back-door amendment to the FOIA when it could very easily have done so . . . by a blanket enactment pertaining to discovery *in pending administrative enforcement proceedings.* [36]

534 F.2d at 491-92 (emphasis added).[12] Exemption 7(A) has particular relevance when a law enforcement proceeding is pending, as is the case here.

III. EXEMPTION 5

Since in my view that Exemption 7(A) requires affirming the district court's judgment, I would not need to reach the question of the applicability of Exemption 5. *See* Maj.Op. at 30 of 598 F.2d. Yet even with respect to Exemption 5, I do not perceive a significant fault with the result reached by the district court.

I agree with much of the majority's discussion of the scope of Exemption 5. That exemption "withholds from a member of the public documents which a private party could not discover in litigation with the agency." *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 148, 95 S.Ct. 1504, 1515, 44 L.Ed.2d 29 (1975). The Exemption is aimed at protecting "confidential intra-agency advisory opinions" the disclosure of which would injure "the consultative functions of government," *id.*, at 149, 95 S.Ct. 1504, and in preserving the attorney-client and attorney work-product privileges generally available to all litigants, *id.* See Maj.Op. at 23 of 598 F.2d. Properly construed, Exemption 5 requires the disclosure of all documents which embody the agency's "effective law and policy," and permits the withholding of documents which "reflect the agency's group thinking in the process of working out its policy and determining what its law shall be." *Sears, supra*, 421 U.S. at 153, 95 S.Ct. at 1517. As a rough guide, predecisional documents are protected, while postdecisional documents are not. *Id.*, at 150-53, 95 S.Ct. 1504, Maj.Op. at 23 of 598 F.2d.

In *Sears*, the Court ruled that memoranda prepared by the General Counsel for the National Labor Relations Board (NLRB) deciding *not* to issue a complaint must be disclosed under the FOIA. *Sears, supra*, 421 U.S. at 155-59, 95 S.Ct. 1504. Against the General Counsel's contention that the memoranda represented only the first step in litigation, the Court stated:

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[12] It should be noted that the court limited its holding to the NLRB context. 534 F.2d at 492. I believe that holding should not be so limited.

I also agree with *United States* v. *Murdock*, 548 F.2d 599 (5th Cir. 1977), which involved an appeal from a criminal tax conviction:

> We hold that the discovery provisions of the Federal Rules of Criminal Procedure and the FOIA provide two independent schemes for obtaining information through the judicial process. Although information obtained through the FOIA may be useful in a criminal trial, we find that the FOIA was not intended as a device to delay ongoing litigation or to enlarge the scope of discovery beyond that already provided by the Federal Rules of Criminal Procedure.

548 F.2d at 602.

Plainly, an Appeals Memorandum is the first step in litigation only *when the appeal is sustained and it directs the filing of a complaint;*

Id., at 157, 95 S.Ct. at 1520. The Court concluded as follows:

[These memoranda are "final opinions" made in the "adjudication of cases" which must be indexed pursuant to 5 U.S.C. § 552(a)(2)(A). The *decision to dismiss a charge* is a decision in a "case" and constitutes an "adjudication": and "adjudication" is defined under the Administrative Procedure Act, of which 5 U.S.C. § 552 is a part, as "agency process for the formulation of an order," 5 U.S.C. § 551(7); an "order" is defined as "the whole or a part of a *final disposition*, where affirmative [or] negative . . . of an agency in a matter . . .," 5 U.S.C. § 551(6) (emphasis added); and *the dismissal of a charge*, as noted above, is a "final disposition." Since an Advice or Appeals Memorandum explains the reasons for the "final disposition" it plainly qualifies as an "opinion"; and falls within 5 U.S.C. § 552(a)(2)(A).

Id., at 158-59, 95 S.Ct. at 1520 (emphasis added).

However, the Court in *Sears* also ruled that memoranda "which *direct the filing of a complaint . . . fall within the coverage of Exemption 5.*" *Id.*, at 159, 95 S.Ct. [37] at 1521; emphasis added. The Court indicated that it reached that conclusion only because the decision-maker, namely, the General Counsel, had to become a litigating party to the case with respect to which he had made his decision, and that this fact invoked the attorney's work-product policies covered by the exemption. *Id.*, at 160, 95 S.Ct. 1504.

It is significant, in my view, that the documents disclosed in *Sears* involved decisions not to file complaints which *ended the adjudicatory process.* Here, the adjudicatory process continues. There is no absolute barrier to amending the complaint, perhaps to include charges that the Commission as an initial matter chose not to include in the complaint at this time. *See* 16 C.F.R. § 3.15(a) (amendments of pleadings, including complaints). While it is true that the FTC apparently terminated an early effort to deal with alleged violations in the analgesics industry by rule, and while the FTC at this time has concluded that certain charges should not be included in the complaint, it seems to me that these conclsuions are not "final" until the proceeding has come to an end or has been finalized in some definite way.

Because I do not believe that a final disposition has been made with respect to the records which appellant seeks, I would hold that the documents are predecisional and reflective of the agency's group thinking in the process of working out its policy and determining what action to take. This is not a situation where the information will be forever hidden from the public; rather, in due course, the information will be available once the final decision is rendered. Discovery for

litigation purposes not being a stated purpose of the Act, *Renegotiation Board* v. *Bannercraft Clothing Co.*, 415 U.S. 1, 24, 94 S.Ct. 1028, 39 L.Ed.2d 123 (1974), I do not see that the purpose of the Act is thwarted by such result.

Also, I agree with the majority's conclusion that the documents in categories D, E, and H fall well within the category of work-product. Maj.Op. at 29 of 598 F.2d. Because I do not believe that the Commission has issued a "final opinion" which might render such work-product documents disclosable, *see Sears, supra*, 421 U.S. at 161, 95 S.Ct. 1504, I find here an independent basis for applying the fifth exemption. And I find no reason to remand the case for further consideration on this point.

For the reasons stated in the foregoing opinion, I respectfully dissent.

UNITED STATES v. ARA SERVICES, INC.*

Cause No. 77-1165C (1). F.T.C. Docket No. C-2360.

(United States District Court, Eastern District of Missouri, September 6, 1978)

In a civil penalties action charging a wholesale distributor of periodicals and paperbacks with violating an FTC anti-merger order, court granted defendant's motion for a protective order to bar government counsel from inquiring into matters discussed during a meeting between defendant's counsel and the counsel and three executives of a co-defendant in two civil actions pending at the time of the meeting. Court held that although such communications are not usually privileged because of third-party disclosure, there is exception when exchange of information is to facilitate representation of clients in matters of common interest in pending or future proceedings. Court rejected government's argument that because defendant was permitted a full inquiry as to everything discussed between government-deposed witnesses government may expect the same treatment, holding that there is no law to support such an assertion of "mutuality."

Robert D. Kingsland, U.S. Atty., and *Wesley D. Wedemeyer,* Asst. U.S. Atty., St. Louis, Mo., *Joseph J. Gercke,* Asst. Director for Compliance, Bureau of Competition, FTC, Washington, D.C., *R. Baylor Rowe, Victor L. Cohen,* and *P. Abbott McCartney,* Bureau of Competition, FTC, Washington, D.C., *Charles R. McConachie,* Chief, Consumer Affairs Sec., Antitrust Div., Dept. of Justice, Washington, D.C., *John R. Fleder,* Consumer Affairs Sec., Antitrust Div., Dept. of Justice, Washington, D.C., *Veryl L. Riddle, Daniel R. O'Neill,* and *Lee H. Wagman,* of *Bryan, Cave, McPheeters & McRoberts,* St. Louis, Mo., *James S. Campbell* and *William J. Kolasky, Jr.,* of *Wilmer, Cutler & Pickering,* Washington, D.C., and *Irl B. Baris,* St. Louis, Mo., for parties.

Before MEREDITH, *District Judge.*

MEMORANDUM

This matter is before the Court on plaintiff's motion for clarification and on defendant's motion for a protective order. For the reasons stated below, both motions will be granted.

Defendant is a wholesale distributor of periodicals and paperbacks. This is a suit by the United States government under Section 16(a)(1) of the Federal Trade Commission Act, as amended, 15 U.S.C. § 56(a)(1) (Supp. V, 1975), § 11(1) of the Clayton Act, as amended, 15

*Not reported in Federal Reporter. Reported in Trade Reg. Rep. ¶ 62,221 at 75,426 (1978-2 Trade Cases). For case before the Commission, see 82 F.T.C. 753.

U.S.C. § 21(1), and 15 U.S.C. § 45(1) (Supp. V, 1975), for civil penalties and equitable relief for violations of a final order to divest and to cease and desist issued by the Federal Trade Commission.

In 1973, the Federal Trade Commission issued a complaint charging ARA with violations of Section 7 of the Clayton Act. Defendant consented to divest and to cease and desist.

The government now contends that ARA has violated that consent order by acquiring new operations in various cities in the United States.

On January 19, 1978, counsel for defendant interviewed three executives of Cadence Industries, the wholly owning parent of Curtis Publishing Company, concerning the latter's decision to cease doing business with Mark Molasky's wholesale agencies. Later this year, on June 21, attorneys for the government attempted to elicit from one Joseph Walsh, a witness who was questioned at the January 19 meeting, what was said at the meeting. Counsel for defendant objected with respect to "questions intended to elicit testimony from Mr. Walsh about statements made or questions asked by counsel for ARA, because such testimony might result in disclosure of information privileged both as attorney-client communications and as attorney work product."

The meeting in question took place at the offices of Cadence Industries in West Caldwell, New Jersey. James S. Campbell and Deborah E. Glass appeared as attorneys for ARA. Joseph Walsh, Robert Alleger, and Sheldon Feinberg were officers appearing on behalf of Cadence Industries. Stuart Freedman and Stuart Savett appeared as attorneys on behalf of Cadence.

Counsel for ARA states that the meeting was held to consider events during the Fall of 1976 relating to the decision by Curtis to cease doing business with certain periodical distribution agencies owned by Mark Molasky, and relating to Curtis' effort to find an alternative channel of distribution for its publications in St. Louis, Kansas City, and New Orleans, after it had ceased doing business with Molasky.

Defendant contends that these matters are directly relevant to two civil actions pending at that time as well as the instant litigation.

In one suit, *Palmer News, Inc. v. ARA Services, Inc.*, Civil Action No. 75-254C (5) (D. Kan., filed Dec. 17, 1975), both ARA and Curtis Circulation Co. are defendants.

In the second suit, *Curtis Circulation Co. v. SLF News Distributors, Inc.*, Civil Action No. 76-508C (2) (E. D. Mo., filed Oct. 1976), ARA is of the opinion that it may be joined as a party to a counterclaim already filed against Curtis.

ARA contends that this meeting in January was held in connection with the defense of both civil suits and the case at bar.

Plaintiff asserts that Mr. Walsh can testify because the meeting was merely a fact gathering interview. Plaintiff further makes the totally fallacious argument that because defendant was permitted a full inquiry as to everything discussed between witnesses who were deposed by the government, plaintiff may expect the same treatment. There is no law to support such an assertion of "mutuality."

The Court is of the opinion that defendant's motion for a protective order is well founded. Although communications of the nature involved here would normally not be privileged because of disclosure to third parties, there is an exception when information is exchanged in order to facilitate representation of clients in matters of common interest in pending proceedings and in any proceedings that may arise in the future. *Hunydee v. United States,* 355 F.2d 183, 185 (9th Cir. 1965); *Magnaleasing, Inc. v. Staten Island Mall,* 76 F.R.D. 559, 564 (S.D.N.Y., 1977); *Matter of Grand Jury Subpoenas, Etc.,* Nov. 16, 1974, 406 F.Supp. 381, 388 (S.D.N.Y. 1975).

Accordingly, defendant's motion for a protective order will be granted. Plaintiff's counsel will be barred from inquiring by any of the possible means of discovery into statements made or questions asked by attorneys for ARA or by attorneys for Cadence Industries during the course of the meeting between ARA counsel, counsel for Cadence Industries, and executives of Cadence held on January 19, 1978.

The Court will next treat "plaintiff's motion for clarification" of the Court's order of July 20, 1978. Plaintiff desires the Court to indicate "whether the Court has concluded that the subpoenaed tape recordings are not corporate records of the various Molasky corporations."

In paragraph 5 of that order the Court clearly stated that the tapes are "the personal property of Mark Molasky." This conclusion vitiates any contention that the records were records of the various Molasky corporations. In order that both sides and the record are clear with respect to this issue, the July 20, 1978 order will be amended to include the following paragraph:

> It is further ordered that the subpoenaed tape recordings are not the corporate records of any of the various Molasky corporations and that the tapes belong solely to the individual, Mark Molasky.

UNITED STATES v. ARA SERVICES, INC.*

Cause No. 77-1165C(1). F.T.C. Docket No. C-2360.

(United States District Court, Eastern District of Missouri, Eastern Division, September 13, 1978)

On Government's motion to compel discovery of previously requested documents in an action seeking civil penalties for alleged violations of an F.T.C. anti-merger consent order, court ordered production of some of the sought documents, but denied discovery of documents protected by court order in a civil antitrust action before the District Court of Kansas.

Robert D. Kingsland, U.S. Atty., *Wesley D. Wedemeyer,* Asst. U.S. Atty., St. Louis, Mo., *Joseph J. Gercke,* Asst. Director for Compliance, Bureau of Competition, FTC, Washington, D.C., *R. Baylor Rowe, Victor L. Cohen,* and *P. Abbott McCartney,* Bureau of Competition, FTC, Washington, D.C., *Charles R. McConachie,* Chief, Consumer Affairs Sec., Antitrust Div., Dept. of Justice, Washington, D.C., *John R. Fleder,* Consumer Affairs Sec., Antitrust Div., Dept. of Justice, Washington, D.C., *Veryl L. Riddle, Daniel R. O'Neill,* and *Lee H. Wagman* of *Bryan, Cave, McPheeters & McRoberts,* St. Louis, Mo., *James S. Campbell* and *William J. Kolasky, Jr.,* of *Wilmer, Cutler & Pickering,* Washington, D.C., for parties.

Before MEREDITH, *District Judge.*

MEMORANDUM

This matter is before the Court on the plaintiff's motion to compel discovery. For the reasons stated below, plaintiff's motion will be granted in part and denied in part.

The defendant, a nationwide wholesale distributor of periodicals and paperbacks, is being sued by the United States for violations of various antitrust laws. Following a Federal Trade Commission complaint in 1973, the defendant and the United States entered a consent decree and order. The government now contends that ARA violated that consent decree and order by acquiring new operations in St. Louis, Kansas City, and New Orleans.

Pursuant to Rule 37(a) of the Federal Rules of Civil Procedure, plaintiff has filed a motion for an order compelling defendant to produce certain documents described in plaintiff's first request for the production of documents filed January 26, 1978.

*Not reported in Federal Reporter. Reported in Trade Reg. Rep. ¶ 62,250 at 75,576 (1978-2 Trade Cases). For case before the Commission, see 82 F.T.C. 753.

The request has been first objected to by defendant on the grounds that documents dated prior to January 1, 1976 are irrelevant and to require ARA to search back as far as 1970 is "staggeringly burdensome." The Court agrees that not all pre-1976 documents would be relevant and that some of the request is unreasonable. *Quonset Real Estate Corp.* v. *Paramount Film Distributing Corp.*, 50 F.R.D. 240 (S.D.N.Y. 1970). The defendant will therefore be required to produce documents dating back as far as January 1, 1973.

Finally, the defendant contends the scope of plaintiff's first request for the production of documents is too broad and should be limited to certain geographic areas. Since the alleged antitrust violations involve more than a local market, the plaintiff's request appears calculated to lead to the discovery of admissible evidence. Rule 26, F.R.C.P.

The government has proposed a compromise request which requires ARA to search through each periodical distribution group office that has not to this date been searched to determine and state what responsive documents each particular office has and forward copies to the plaintiff. This request is clearly within the scope of discovery, Rule 26, F.R.C.P.; *Vermilyee* v. *Chesapeake & O. Ry. Co.*, 11 F.R.D. 255, 258 (E.D.Pa. 1951). Therefore, the Court will order the defendant to search each of its periodical distribution group offices which has not yet been searched and produce all documents revealed by these searches and previous searches to the plaintiff.

The defendant has also refused to permit the government to inspect and copy documents which were produced April 13, 1978, under subpoena power by counsel for Palmer News, Inc., a plaintiff in a civil antitrust action in the United States District Court of Kansas. Defendant ARA is also a defendant in that civil action.

In the Palmer News litigation, the court entered a protective order that the documents produced "shall be used only for the purposes of this litigation and not for any business or other purposes whatsoever." This Court will, therefore, grant plaintiff's motion only insofar as it requests documents which were not afforded "confidential" treatment by the aforementioned order of the District Court of Kansas. All documents under protective order in that case shall not be discoverable by the government in this case. *GAF Corp.* v. *Eastman Kodak Co.*, 415 F.Supp. 129 (S.D.N.Y. 1976).

The government has also moved for an order compelling a response to interrogatories No. 10(b), 10(c), and 10(e) from plaintiff's first set of interrogatories. Defendant has not illustrated any compelling reason why these questions should not be answered. They are clearly calculated to lead to the discovery of admissible evidence and, despite the burden on the defendant, will be ordered answered.

Defendant's contention that there is a lack of time in which to respond due to a trial date of August 28, 1978, is now moot since that trial setting has been continued. Defendant has indicated it has responded to Interrogatory No. 10(e). The motion will therefore be denied as moot.

FEDERAL TRADE COMMISSION v. BEATRICE FOODS COMPANY and TROPICANA PRODUCTS, INC.*

No. 78-1673. F.T.C. Docket No. 9112.

(United States Court of Appeals, District of Columbia Circuit, September 19, 1978)

On suggestion for Rehearing En Banc Civil Action 78-1260.

Before WRIGHT, *Chief Judge*, and BAZELON, MCGOWAN, TAMM, LEVENTHAL, ROBINSON, MACKINNON, ROBB and WILKEY, *Circuit Judges*.

ORDER

PER CURIAM.

Upon consideration of the suggestion for rehearing *en banc* of 188 U.S.App.D.C. 438, of 580 F.2d 701, filed by appellant Federal Trade Commission, and a majority of judges of the Court in regular active service not having voted in favor thereof, it is

Ordered by the Court, *en banc*, that appellant's aforesaid suggestion for rehearing *en banc* is denied.

Chief Judge J. SKELLY WRIGHT did not participate in the foregoing order.

Circuit Judge MCGOWAN would grant appellant's suggestion for rehearing *en banc*.

Circuit Judges BAZELON and LEVENTHAL have abstained from voting on the suggestion for rehearing *en banc*.

Statement of *Circuit Judge* BAZELON, with whom *Circuit Judge* LEVENTHAL joins, on appellant's suggestion for rehearing *en banc*.

Statement of *Circuit Judge* MCGOWAN, on appellant's suggestion for rehearing *en banc*.

Statement of *Circuit Judges* MACKINNON and ROBB, on appellant's suggestion for rehearing *en banc*. [1226]

STATEMENT OF *CIRCUIT JUDGE* BAZELON, WITH WHOM *CIRCUIT JUDGE* LEVENTHAL JOINS, ON PETITIONER'S SUGGESTION FOR REHEARING *EN BANC*.

*Reported in 587 F.2d 1225 (1978).

The Federal Trade Commission unsuccessfully sought in district court a preliminary injunction against the merger of Beatrice Foods Co. and Tropicana Products, Inc., pending completion of administrative action against the combination. A motions panel of this court, with *Judge* McGOWAN dissenting, affirmed the denial of the injunction on Wednesday, August 2, and dissolved, as of 4 p.m. the following day, the administrative stay against the merger that had been entered by an earlier motions panel. On that next morning, Thursday, August 3, the Commission filed its motion for rehearing and suggestion for rehearing *en banc*, alleging that the trial court's findings of fact were insufficient. That afternoon the panel granted rehearing, extended the stay indefinitely, and remanded the record to the district court for specific findings of fact. The district court entered further factual findings the following morning, Friday, August 4. Although the FTC requested additional time to prepare a response to the findings of fact, the panel, acting on Friday afternoon without the participation of *Judge* McGOWAN, found those findings sufficient and ordered that the stay against the merger lapse at noon on Monday, August 7. The merger was consummated on Monday afternoon.[1]

Under the circumstances, there was no meaningful opportunity for consideration of the *en banc* suggestion prior to merger. In addition to problems of legal mootness with respect to the suggestion, it would obviously be fruitless to consider the matter further in a post-merger stance. Accordingly, I have decided to abstain from voting on the suggestion for *en banc* hearing. This will also serve to emphasize that the views of two judges on this court on the merits of the Commission's objection to the merger—and in this case the panel's order was entered on the basis of its view of the probable merits—are not to be taken as reflecting the views of the court. In general a vote against *en banc* or a failure to vote thereon is not to be identified as a view on the merits; that proposition is underscored when there has been no opportunity to focus on the merits in a meaningful and timely way.

STATEMENT OF *CIRCUIT JUDGE* MCGOWAN, ON APPELLANT'S SUGGESTION FOR REHEARING *EN BANC*.

I have voted to grant the suggestion for rehearing *en banc*, and while there are now problems of mootness I do not withdraw that vote. I concurred in the remand, but did not have an opportunity to consider the matter after the filing of the district court's findings of fact on remand.

[1] Following the general practice of many of the members of this court, I deferred consideration of the initial suggestion for rehearing en banc to await final action by the panel. When the panel granted rehearing the suggestion was mooted. I was not advised of the panel's ultimate denial of the preliminary injunction until about 11 a.m. on Monday, August 7, too late for even minimal consideration of the case before completion of the merger. It follows, of course, that I have never voted on any matter in this case at any time.

STATEMENT OF *CIRCUIT JUDGES* MACKINNON AND ROBB, ON APPELLANT'S SUGGESTION FOR REHEARING *EN BANC*.

As members of the panel assigned to consider this case we thoroughly read and considered the entire 300-page transcript of the two-day hearing on the preliminary injunction together with all the extensive briefs of the parties. All the legal and factual issues are thoroughly presented and discussed therein and the record and briefs fully support the conclusion that the evidence sustains the judgment of the trial court and is insufficient to sustain the shifting contentions of the Federal Trade Commission. The reasons for our conclusions, evidenced by orders issued during the proceedings, were fully set forth in accompanying memoranda, and demonstrated that the panel was thoroughly familiar with the law, the facts and the issues, and that further argument was not necessary. (See Appendix)

[1227] *Judge* McGOWAN's inability to participate in the matter after the filing of findings of fact pursuant to our remand was caused by his absence from the city and our inability to reach him by telephone. It was accordingly necessary to show him as not participating, as our order reflects—rather than his prior position as dissenting, which would not have altered the court's order. Also the Clerk contacted all the available judges and the result indicated there were insufficient votes to order *en banc* consideration even if the two judges who could not be contacted voted for such rehearing. Actually, one of those judges subsequently voted against *en banc* hearing. *Judge* BAZELON was one of the first to vote. All orders issued contained a stay to permit request to the Supreme Court for further stay but the Commission did not make any such request.

APPENDIX TO JOINT STATEMENT OF JUDGES MACKINNON AND ROBB

On July 8, 1978 the Federal Trade Commission having appealed from *Judge* HART's order denying a temporary restraining order, *Judges* FAHY and MACKINNON granted a stay until further order of the court to permit fuller consideration of the appeal. On July 10, 1978 *Judges* FAHY and MCGOWAN, by order, noted that the Commission had not sought to enjoin the shareholders' meeting of Tropicana, and accordingly authorized the holding of that meeting to approve the proposed merger with Beatrice Foods, Inc. The stockholders approve the merger.

I

On July 18, 1978 *Judge* HART, following a two-day evidentiary hearing, issued the following order in response to the petition of the Federal Trade Commission for a Preliminary Injunction to enjoin the acquisition by Beatrice Foods Company of Tropicana Products, Inc., which acquisition, originally scheduled for July 10, 1978, had been temporarily postponed.

ORDER DENYING PRELIMINARY INJUNCTION

Upon consideration of the application for a Preliminary Injunction filed by the plaintiff herein, and after a hearing held on July 17, and 18, 1978, at which the Court received voluminous documentary evidence from both parties and heard six witnesses proffered by defendants, and after consideration of the weight and competence of the evidence and argument from counsel for all parties, it appears to the Court that Beatrice Foods Company and Tropicana Products, Inc. have not been shown to be competitors in the processing, distribution and sale of ready to serve orange juice on a national basis to any appreciable degree, and that such competition as exists between them nationally is *de minimus* [sic].

Therefore, after weighing the equities and concluding that it does not appear likely that the plaintiff will ultimately succeed and prevail on the merits, it is by the Court this 18th day of July, 1978,

Ordered, that the Application for a Preliminary Injunction be, and the same is hereby, denied.

/ s / George L. Hart, Jr.
GEORGE L. HART, JR.
United States District Judge

II

The Commission appealed this order and on August 2, 1978, the current motions panel issued the following Judgment and Memorandum.

Before MCGOWAN, MACKINNON and ROBB, *Circuit Judges.*

JUDGMENT

This case came on to be heard on the original record on appeal and motions and other pleadings have been filed by the parties. Upon consideration of the foregoing, it is

Ordered and Adjudged, by the Court, that the judgment of the District Court on appeal herein is affirmed, for the reasons set forth in the attached memorandum.

Per Curiam.

[1228] *Judge* MCGOWAN would grant an injunction pending appeal, fix an expedited briefing schedule, and schedule oral argument for the September 1978 sitting period. *See FTC* v. *Food Town Stores, Inc.*, 539 F.2d 1339 (4th Cir. 1976); *FTC* v. *Lancaster Colony Corp.*, 434 F.Supp. 1088 (S.D.N.Y. 1977).

MEMORANDUM

The Federal Trade Commission (FTC) is seeking to enjoin Beatrice Foods Co. (hereafter Beatrice) from acquiring "Tropicana" Products, Inc. (hereafter Tropicana). To this end it has petitioned this court, pursuant to section 13(b) of the Federal Trade Commission Act[1] for a temporary restraining order and a preliminary injunction to prohibit Beatrice and Tropicana from carrying out the acquisition during the pendency of an administrative proceeding by the FTC under sections 7 and 11 of the Clayton Act[2] and section 5 of the Federal Trade Commission Act.[3]

When the matter was first here on appeal from the District Court's denial of a temporary restraining order the Motions Panel on July 8, 1978 issued an administrative stay to preserve the status quo to permit the court to consider the matter more fully. Thereafter on July 12 we continued the injunction to permit a further hearing before the District Court. Following that hearing the District Court refused to grant a preliminary injunction[4] and the FTC appeals from that decision.

Beatrice and Tropicana entered into a merger agreement as of April 27, 1978. Thereby Tropicana would maintain its corporate identity and become a "wholly owned subsidiary" of Beatrice. All preliminary steps have been taken to complete the transaction which could have been completed on July 11, 1978, except for our administrative stay. The FTC contends that the merger would result in a single firm (Beatrice) controlling an undue percentage of the market in "ready to serve orange juice" sold to retail stores. It further alleges that other results would be a "*significant increase*" in the concentration of firms in that market; that it "would be likely to lessen competition substantially," Complaint § 5, and that the merger would eliminate Tropicana as an independent and viable competitive entity in the ready to serve orange juice industry. *Id.*, § 6.

Actually ready to serve orange juice is an infinitesimal part of the business of Beatrice, a minor side line of its dairy processing business, *Id.* 10. According to the testimony of a leading economist, who it was stated is regularly retained by the FTC and the Antitrust Division of the Department of Justice, the fiscal 1977 sales of Beatrice were over 6.3 billion dollars and its net earnings were $221 million while its sales of "ready to serve juice" only amounted to $1,500,000. Orange juice however is sold in other forms, principally in some frozen and concentrated forms. It is then reconstituted by merely adding water. The geographic market is alleged by the FTC to be the entire nation, but the question also arises as to whether the merger might bring about anti-competitive effects in a "Nine State [1229] Market" in the mid-continental area where Beatrice makes its principal sales.

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[1] Section 13(b) provides:

(b) Whenever the Commission has reason to believe—

(1) that any person, partnership, or corporation is violating or is about to violate, any provision of law enforced by the Federal Trade Commission, and

(2) that the enjoining thereof pending the issuance of a complaint by the Commission and until such complaint is dismissed by the Commission or set aside by the court on review, or until the order of the Commission made thereon has become final, would be in the interest of the public—

the Commission by any of its attorneys designated by it for such purpose may bring suit in a district court of the United States to enjoin any such act or practice. Upon a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest, and after notice to the defendant, a temporary restraining order or a preliminary injunction may be granted without bond * * *.

15 U.S.C. § 53(b).

[2] 15 U.S.C. §§ 18, 21.

[3] 15 U.S.C. § 45.

[4] July 18, 1978.

The testimony of appellees' economist produced the following chart of the various orange juice markets:

	Ready to Serve Juice	Ready to Serve Juice and Institutional Frozen	Ready to Serve Juice and All Frozen
U.S. Total	$780,000,000	$950,000,000	$2,000,000,000
Tropicana	157,000,000	157,000,000	157,000,000
Beatrice	1,500,000	1,500,000	1,500,000
Market Share			
Tropicana	20.1%	16.6%	7.8%
Beatrice	0.19%	0.14%	0.075%
9 State Market			
Total (20%)	$156,000,000	$190,000,000	$400,000,000
Tropicana	8,500,000	8,500,000	8,500,000
Beatrice	750,000	750,000	750,000
Market Share			
Tropicana	5.5%	4.4%	2.1%
Beatrice	0.5%	0.39%	0.19%

In contrast to this showing the FTC relies upon a single "ready to serve orange juice" market and the so-called Neilsen statistics which the Beatrice economist testified understated the total industry sales by approximately 50%.

The Neilsen figures assert the following:

Ready to Serve Orange Juice Sales	
Tropicana	160,900,000 gallons
"	29% of nationwide market sales
Beatrice	2,770,000 gallons
"	1.7% of nationwide market sales

Following a rather extensive hearing of oral testimony on the preliminary injunction and the submission of additional affidavits, depositions and exhibits, the District Court on July 18 denied the request of the FTC for a preliminary injunction on the following grounds:

> . . . [A]fter consideration of the weight and competence of the evidence and argument from counsel for all parties, it appears to the Court that Beatrice Foods Company and Tropicana Products, Inc. have not been shown to be competitors in the processing, distribution and sale of ready to serve orange juice on a national basis to any appreciable degree, and that such competition as exists between them nationally is *de minimus* [sic].
>
> Therefore, after weighing the equities and concluding that it does not appear likely that the plaintiff will ultimately succeed and prevail on the merits, [the Court denied the application for a Preliminary Injunction].

We agree with the statement by the Federal Trade Commission as to the standard by which the proceeding must be judged:

> The appropriate definition of the Commission's burden under Section 13(b) was articulated in *FTC* v. *Lancaster Colony Corp.*, 434 F.Supp. 1088, 1090 (S.D.N.Y. 1977), where the court held that "the FTC meets its burden on the 'likelihood of success' issue if it shows preliminarily, by affidavits or other proof, that it has a fair and tenable chance of ultimate success on the merits." It amplified this standard by stating that, if the FTC made the requisite showing on the equities a preliminary injunction should issue if the FTC has raised questions going to the merits so serious, substantial, difficult and doubtful as to make them fair ground for thorough investigation, study, deliberation and determination by the FTC in the first instance and ultimately by the Court of Appeals. Cf. *Hamilton Watch Co.* v. *Benrus Watch Co.*, 206 F.2d 738, 740 (2d Cir. 1953), enjoining a merger under the Clayton Act. [434 F.Supp. at 1090-91.]

FTC Brief, pp. 18-19.

In applying this standard at this stage of the proceeding we are also required to consider the inroads that the appellees' extensive showing has made on the proof submitted by the Commission. The appellees' proof has not been insubstantial. It has pointed out many weaknesses in the claims, theory and evidence of the FTC. As a result several basic contentions of the FTC are called into serious question. For example, the contradictory figures on the size, nature and location of the relevant market or markets strongly indicate basic flaws in the FTC theory and supporting data; and other deficiencies are referred to below. The FTC claim is also plagued by a theory that implicitly argues, in effect, that if the [1230] New York Yankees were to be acquired by Bloomington of the Three-I League, the shift of ownership would create a concentration of prior competitors that "would be likely to lessen competition substantially" and tend to create a monopoly in national baseball. But the *de minimis* amount of competition so added (here constituting according to the testimony of Dr. Gould, less than one-half of one percent of the national number), does not create the substantial reduction of competition that is necessary to constitute a violation of the antitrust laws.

It is apparent that the District Court found the market figures of appellees to be the more accurate and accordingly concluded it was unlikely that appellant would ultimately succeed and prevail on the merits because of the *de minimis* competition involved. It is perfectly obvious that if Beatrice's shares of the national and regional markets are only .19% and .5% respectively, as testified to by Dr. Gould, then Beatrice is insufficiently competitive in the national ready to serve orange juice market for the FTC to support the allegations of *substantial* competition that are contained in the complaint. The FTC seeks to support its attack on the court's findings by the Neilsen figures it presented at the hearing. We note, however, the deficiencies in these figures that were testified to at the hearings, including testimony that the Neilsen service was only relied upon for a limited purpose of establishing trend relationships in brand names, (Tr., July 17, 18, 1978, p. 226) and was not completely reliable and relevant for the purpose of this case. The Commission's figures also apparently involved some double counting of orange juice sold by Tropicana to Beatrice and resold by the latter, (Tropicana Rep. Br., pp. 25-27), and the FTC engaged in some shifting of the relevant market by alleging in its District Court complaint that Beatrice and Tropicana were in competition in sales of "ready to serve orange juice directly or indirectly to retail merchants." (Complaint §§ 12, 13). The earlier complaint before the Commision referred generally to the "processing distribution and sale of ready to serve orange juice." (Complaint, § 13)

For the foregoing reasons, and on the record as a whole, since we cannot say that the District Court abused its discretion, we affirm its judgment.

Judgment accordingly.

III

The very next day, on August 3, 1978, the Commission filed a Petition for Rehearing and Suggestion for Rehearing En Banc, with respect to the Judgment of this Court dated August 2, 1978. This Petition raised a point the FTC had not raised in its first appeal, i.e., that the District Court's July 18 order did not include specific findings as allegedly required by Rule 52, F.R. Civ.P.[1]

IV

On the same day the FTC's Petition was filed, August 3, 1978, the motions panel granted rehearing and, notwithstanding that the FTC had not raised the issue initially, ordered the District Court promptly to file additional findings. This was directed by the following Order and Memorandum:

Before McGOWAN, MACKINNON and ROBB, *Circuit Judges.*

ORDER

[1231] On consideration of appellant's petition for rehearing, it is

Ordered by the Court that the petition for rehearing is granted, and the order and judgment entered on August 2, 1978, are vacated. The judgment on appeal in No. 78-1673 is vacated and the record is remanded to the District Court for the prompt preparation of specific findings of fact and conclusions of law as required by Federal Rule of Civil Procedure 52(a) and in conformance with the attached memorandum, it is

Further Ordered by the Court that the injunctive orders entered by this Court on July 8th & 12th, 1978 are continued in effect pending further order of this Court.

PER CURIAM.

MEMORANDUM

The petition for rehearing by the FTC contends that the trial court's disposition of its petition for a preliminary injunction did not contain sufficient findings of fact and conclusions of law to satisfy F.R.Civ.P. 52(a). As the court's order indicates it did find the ultimate fact that the FTC had *not* made a showing of substantial competition between the parties to the merger. From such factual finding the court entered the conclusion of law that the FTC was unlikely to succeed on the merits. Obviously the facts could have been found more specifically.

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[1] F.R. Civ.P. 52(a) provides: (a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

The FTC's objection to the findings of the District Court is now raised for the first time. The FTC was aware of the trial court's findings with respect to Rule 52(a) because it referred to those findings in its brief to this court filed July 25, 1978, page 2, n.2, but instead of objecting to them *it relied thereon. Id.*, p.2. If the FTC found fault with the failure of the trial court to find further facts, as pointed out in *McMahon* v. *Caribbean Mills, Inc.*, 332 F.2d 641 (10th Cir. 1964), it should have "[drawn] the trial court's attention to the objection . ." only now made to this court. Failing this, appellant has no standing to claim on appeal that the findings and conclusions are insufficient. We would accordingly be justified in denying the FTC's petition for rehearing on this ground. However, since the trial court conducted a full hearing we feel that the parties should receive the benefit of his further findings. Therefore we vacate our order of August 2, 1978 terminating the stay previously issued herein and direct the District Court promptly to enter specific findings of fact and conclusions of law. The record is remanded for that purpose.

V

On August 4, 1978, the District Court filed the following Findings of Fact and Conclusions of Law:

Findings of Fact and Conclusions of Law

Pursuant to the order of the United States Court of Appeals for the District of Columbia Circuit, filed August 3, 1978 in the above matters, the following findings of fact and conclusions of law are made:

Findings of Fact

1. Tropicana Products, Inc. ("Tropicana") is a corporation organized under the laws of the State of Florida with its principal place of business in Bradenton, Florida. Tropicana's business is primarily the processing and sale of orange juice. Tropicana buys oranges and prepares fresh orange juice which is primarily distributed in glass containers. A substantial additional amount of the product is concentrated and sold as frozen orange juice in various sizes of containers including both small retail cans and larger "institutional packs".

2. Tropicana primarily distributes its products in New England, New York City, the East Coast, the Middle and South Atlantic states, Florida and the Gulf states. Eighty percent of the orange juice of Tropicana is sold in these areas.

3. Tropicana makes some sales in other states. In the 9-state area comprising the States of Ohio, Indiana, Illinois, Iowa, Mis[1232]souri, Kansas, Nebraska, Oklahoma and Colorado, (the "Nine State Area"), Tropicana's sales are approximately $8,500,000 annually to chains and wholesalers. Tropicana's total sales of fresh orange juice in glass and/or paper containers is approximately $157,000,000 annually.

4. Tropicana primarily sells its orange juice to chain warehouses and grocery wholesalers. The orange juice, primarily in glass containers, is distributed in refrigerated trucks directly to these warehouses. Such deliveries are made throughout the basic market of Tropicana as described above, and such deliveries are also made in the Nine State Area.

5. Tropicana has approximately 12 competitors, including major co-ops, in Florida that process orange juice from the fresh fruit and put it directly into cartons, bottles and cans.

6. Outside of Florida there are many companies who purchase frozen concentrate, add water to the concentrate and deliver it as fresh orange juice; further, there are many companies competing with Tropicana who place the frozen concentrate in retail or institutional cans which are sold to institutional outlets or retail stores. The fresh juice is prepared from the concentrate by having water added at the time the product is used either in the home or in the restaurant.

7. Beatrice Foods Co. ("Beatrice") is a large, diversified company which manufactures a wide variety of products. Beatrice is a Delaware corporation and is headquartered in Chicago, Illinois. It has annual sales of approximately $6,500,000,000.

8. The administrative complaint alleges, and this Court finds, that Beatrice in approximately 12 of its dairy plants, purchases frozen concentrate which is mixed with water in the plant and is packaged in paper or half gallon plastic containers and sold as fresh orange juice. The total outside sales of such reconstituted orange juice from the 12 plants is approximately $1,000,000. In addition, there is approximately $500,000 of orange juice reconstituted in the plants which is shipped interplant by Beatrice. The total sales of reconstituted orange juice by Beatrice in the United States, thus, is approximately $1,500,000.

9. The majority of Beatrice's fluid milk business is in the Midwest in the Nine State Area identified above. In the Nine State Area there are 6 plants that reconstitute orange juice. They are located at: Dayton, Ohio; Zanesville, Ohio; Mattoon, Illinois; Lincoln, Nebraska; Tulsa, Oklahoma; and Greeley, Colorado. The total sales of reconstituted orange juice sold in the Nine State Area by Beatrice is approximately $750,000. The outside sales of the 6 above Beatrice plants are minor and range from $20,000 to $140,000 annually.

10. The orange juice sold by Beatrice is distributed in fluid milk trucks in the general area of the plant. A substantial portion of that distribution is to home delivery customers. In Lincoln, Nebraska, for example, one-third of the orange juice distributed from the Lincoln plant is sold to home delivery customers. Beatrice's milk trucks also distribute orange juice locally to small restaurants and institutions. Finally, a certain portion of the orange juice is distributed to local grocery stores, primarily those requiring direct delivery who do not purchase from warehouses or are not connected with any chain organizations.

11. Beatrice does not have any milk plants in the primary areas served by Tropicana in New England, the Mid-Atlantic states, Florida and the East Coast. The principal area of distribution of Tropicana is not served by Beatrice other than by a small milk plant in Durham, North Carolina.

12. Beatrice does not sell in the major cities such as Cleveland, Detroit, Chicago or Milwaukee. Beatrice does not sell orange juice to the chain warehouses and the wholesale grocers who are served by Tropicana. Beatrice and Tropicana do not compete because Beatrice sells its orange juice locally to home delivery customers, local restaurants and institutional customers and to smaller local grocery stores.

[1233] 13. Within the Nine State Area, Tropicana's sales are primarily to the major metropolitan markets and all of the Beatrice sales are to the smaller city and rural markets.

14. Within the Nine State Area, there are approximately 1,200 dairy companies that compete with Beatrice. Each of these companies either sells a reconstituted orange juice—similar to Beatrice—or could easily supply the product, since it is processed and packaged by the same equipment on which fluid milk is processed and packaged.

15. The administrative complaint charges a violation of law in the "processing and sale" of ready-to-serve orange juice. Beatrice *processes and sells* $1,500,000 of orange juice annually. In addition, Beatice purchases approximately $3,000,000 of orange juice from other sources. A substantial amount of that is purchased from Tropicana. Beatrice in Alabama, for example, purchases 600,000 gallons ($1.2 million at retail).

The complaint does not charge any anti-competitive effects treating Beatrice as a buyer and Tropicana as a seller. Beatrice does not compete with Tropicana in the resale of the product purchased from Tropicana; rather Beatrice acts as a distributor for Tropicana selling to customers who primarily cannot buy directly from Tropicana. In view of the language of the complaint charging competition in *processing and sale* of orange juice, the appropriate figure to use to compare competition between Beatrice and Tropicana is the volume of orange juice reconstituted in the Beatrice plants since such juice involves both "processing and sale"; that total for Beatrice is $1,500,000 in the United States and $750,000 for the Nine State Area.

16. Beatrice and Tropicana do not compete nationally. Beatrice does not sell into the major markets and population centers serviced by Tropicana. While Tropicana sells throughout many states, the areas serviced by Tropicana have different competitors and different methods of distribution. There is no record evidence that buyers and sellers compete on a national basis.

17. Beatrice and Tropicana do make shipments into a Nine State Area, but within that area Tropicana and Beatrice are not competitors; any such competition is *de minimis*.

18. Defendants' expert witness, Dr. Jay M. Gould, is an economist who has specialized in market share statistics for approximately 25 years. He is customarily retained by the Department of Justice and the Federal Trade Commission. The Federal Trade Commission purchases his annual publications. Dr. Gould was the economist for the Department of Justice in the *Brown Shoe* case and his statistical exhibits appear in the appendix to that Supreme Court opinion. Dr. Gould is a qualified economist.

19. For purposes of analyzing the share of market, Dr. Gould analyzed and applied the Florida Citrus Commission statistics to the United States and the Nine State Area. These published statistics analyzed under Dr. Gould's accepted market share methods establish that in the Nine State Area the total size of the market varies from $156,000,000 to $400,000,000, depending upon the products included in the market; further, that the total sales in the United States varies from approximately $780,000,000 to approximately $2,000,000,000, again depending upon the products. Based upon this testimony, the Court makes the following finding as to market shares:

	Ready to Serve Juice	Ready to Serve Juice and Institutional Frozen	Ready to Serve Juice and All Frozen
U.S. Total	$780,000,000	$950,000,000	$2,000,000,000
Tropicana	157,000,000	157,000,000	157,000,000
Beatrice	1,500,000	1,500,000	1,500,000
Market Share			
Tropicana	20.1%	16.5%	7.8%
Beatrice	0.19%	0.14%	0.075%
9 State Market			
Total (20%)	$156,000,000	$190,000,000	$400,000,000
Tropicana	8,500,000	8,500,000	8,500,000
Beatrice	750,000	750,000	750,000
Market Share			
Tropicana	5.5%	4.4%	2.1%
Beatrice	0.5%	0.39%	0.19%

[1234] 20. The market statistics relied upon by the Federal Trade Commission are based upon data of the A.C. Nielsen Company showing samples of brand representation in supermarkets. The Commission's statistics understate the total industry by approximately 50%, are based upon data only relied upon for the limited purpose of establishing trend relationships in brand names, involve some double counting of orange juice sold by Tropicana to Beatrice and resold by the latter and, thus, are not completely reliable. The Court rejects this evidence as inaccurate and unreliable and lacking probative value.

21. The Federal Trade Commission presented the conclusory affidavit of an economist, Dr. Stanley Boyle. The affidavit of Boyle, in turn, is based upon the affidavit of Eugene Waye, an attorney with the FTC who will try the administrative case. There is no showing that Boyle knew anything concerning the subject matter of the case other than what was gleaned from the Waye affidavit. The Court finds the affidavit of Boyle is totally lacking in credibility and contains certain assumptions that are not supported in the record and it is completely overcome by defendants' evidence.

22. The Commission's statistics involve double counting. This double counting arises when the Commission, using the Nielsen universe date (i.e., a projected national retail market), credits to Beatrice's share of that market its resales (approximately $3,000,000 in 1977) as a distributor of juice produced and packaged by others under the producers' (including Tropicana's) respective labels. Under Nielsen, these sales have already been attributed to the producers. When double counting is eliminated, Beatrice's share of the Nielsen market ($1.5 million compared to $300 million) is less than one half of one percent.

23. Consistent with the long standing practice of Beatrice, Tropicana will be operated as a completely separate and virtually autonomous subsidiary of Beatrice under the direction of the same management team that has profitably directed the business of Tropicana in the past. The evidence shows there will be no scrambling or merging of the assets of Tropicana into the assets of Beatrice, nor will there be any change in Tropicana's method of operation in the processing and sale of orange juice.

Conclusions of Law

1. This Court has jurisdiction over the subject matter pursuant to Section 13(b) of the FTC Act, 15 U.S.C. Section 53(b) and 28 U.S.C. Section 1337 and 1345.

2. Venue is proper pursuant to Section 13(b) of the FTC Act and 28 U.S.C. Section 1391(c).

3. Before an injunction can be issued, petitioner must demonstrate that it has a fair and tenable chance of ultimate success on the merits.

4. Beatrice Foods Co. has a *de minimis* share of any three possible product markets: chilled orange juice; chilled orange juice with frozen concentrate sold to institutions; and chilled orange juice with all frozen concentrate.

5. In this case, charging an elimination of actual competition, Section 7 of the Clayton Act requires proof of the sections of the country in which to test the merger determined by those areas of effective competition involving the parties to the merger.

6. Beatrice and Tropicana are not competitors in the processing, distribution and sale of ready-to-serve orange juice on a national basis to any appreciable degree and such competition, if present, is *de minimis*. The United States is not an appropriate area of effective competition or section of the country in which to test the actual competition between Beatrice and Tropicana.

7. Beatrice and Tropicana both have shipments into the nine-state area which is the primary distribution area for the Beatrice milk plants. Within that nine-state area Beatrice, in processing and selling orange juice, does not compete with Tropicana in the sale of orange juice or such competition, if any, is *de minimis.*

8. The Court has weighed the equities, considered the Commission's fair and tenable chance of ultimate success, and concludes that it has not been shown that the issuance of a preliminary injunction would be in the public interest.

/s/ George L. Hart. Jr.
GEORGE L. HART, JR.
United States District Judge

Aug. 4, 1978

VI

Shortly after the filing of the Findings of Fact and Conclusions of Law, the Commission on August 4, 1978, filed an additional memorandum concerning appellate review.

MEMORANDUM CONCERNING APPELLATE REVIEW OF DISTRICT COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. By order of August 3, 1978, this Court granted the petition of appellant Federal Trade Commission for rehearing, vacated its order and judgment of August 2 in this matter, and remanded the record to the district court for "the prompt preparation of specific findings of fact and conclusions of law as required by Federal Rule of Civil Procedure 52(a) and in conformance with the attached memorandum." The Court also continued its injunctive orders of July 8 and 12, 1978, preventing consummation of the merger in issue, "pending further order of this court."

2. On August 4, 1978, in response to this order, the district court issued and filed its findings of fact and conclusions of law. Although the Court apparently adopted proposed findings submitted by appellees, the Commission was given no opportunity to comment on them or to submit its own proposals prior to the District Court's action. We received the findings at approxi[1235]mately 10:15 this morning. Detailed review of these findings and conclusions has not yet been possible.

3. *The Wall Street Journal* of August 4, (at page 4) in reporting on this Court's order of August 3, attributes to the president of appellee Tropicana the expectation that the merger can be consummated on "Friday [August 4] or Monday [August 7]." This assertion appears to suggest that appellees will seek to have this Court's injunctive order vacated without any opportunity for appellant to address the merits of the newly-entered findings and conclusions.

4. Patently, if appellants were not to be permitted to argue the *merits* of the district court's findings and conclusions, the requirement of Rule 52(a) that they be made would be transformed into the emptiest sort of formality. As this Court observed in the *Saginaw Broadcasting Co.* case

> findings of fact serve the additional purpose, where provisions for review are made, of apprising *the parties* and the reviewing tribunal of the factual basis of the action of the court or commission so that *the parties* and the reviewing tribunal may determine whether the case has been decided upon the evidence and the law or, on the contrary, upon arbitrary or extralegal considerations. [*Saginaw Broadcasting Co.* v. *FCC,* 68 U.S.App.D.C. 282, 286, 96 F.2d 554, 559 (1938), *cert. denied,* 305 U.S. 613, 59 S.Ct. 72, 83 L.Ed. 391.] [Emphasis added.]

Clearly the affirmance of the district court's findings and conclusions without affording appellant some chance to uphold its burden of demonstrating their infirmity would make a mockery of this Court's August 3 order.

5. Appellees have injected a spurious sense of urgency into this Court's deliberations by their assertions regarding the importance of August 4 as a deadline.[1] Its [1236] significance is described at pages 4 through 6 of the appellees' Joint Proxy Statement Exhibit V to Waye Affidavit. Copies of those pages are attached for the Court's convenience.* At the close of business today, August 4, Tropicana's

[1] If the *Wall Street Journal* accurately reported Mr. Barnebey's statement, it appears that he, too, does not consider the August 4 date as having any overriding significance.

*Relevant portions are as follows:

THE PROPOSED MERGER

The following information with respect to the proposed merger of Tropicana into a subsidiary of Beatrice (the "Merger") is qualified by reference to the Agreement and Plan of Reorganization ("Reorganization Agreement"), a copy of which is attached to this Joint Proxy Statement as Annex I, and the related Agreement and Plan of Merger ("Merger Agreement"), a copy of which is attached to the Reorganization Agreement as Exhibit A.

Manner and Basis of Converting Shares

Upon consummation of the Merger, Tropicana will be merged into a subsidiary of Beatrice which will change its name to "Tropicana Products, Inc." and succeed to the assets, liabilities and business of Tropicana. The subsidiary is a Florida corporation organized solely for that purpose. Each share of Tropicana Common Stock outstanding at the time the Merger becomes effective ("Effective Time of the Merger") will be converted into one share of Series A Cumulative Convertible Preference Stock of Beatrice ("Series A preference Stock") or the right to receive $52.00 cash. Shares of Beatrice Common Stock and Beatrice Preference Stock outstanding at the Effective Time of the Merger will not be affected by consummation of the Merger.

In the Merger no more than 60% and no less than 52% of the outstanding shares of Tropicana Common Stock will be converted into shares of Series A Preference Stock. Thus, the maximum and minimum number of shares of Series A Preference Stock issuable are 5,637,822 and 4,886,112, respectively. In the Merger no more than 48% and no less than 40% of the outstanding shares of Tropicana Common Stock will be converted into the right to receive $52.00. Thus, the maximum and minimum amounts of cash payable by Beatrice are $234,533,395 and $195,444,496 respectively. The cash to be paid by Beatrice to Tropicana shareholders in connection with the Merger will be obtained from several sources. Approximately $98,000,000 will come from the net proceeds realized from the sale outside of the United States of promissory notes by a wholly-owned financing subsidiary of Beatrice. See Note 8 under "Capitalization". The remaining portion of cash required will initially come from general corporate funds and from unsecured borrowings under lines of credit with domestic commercial banks. It is believed that eventually a substantial portion of the cash so expended will be refinanced through intermediate and long-term borrowings effected by a public offering of debt securities and/or private placements of debt securities.

Included with the material mailed to the Tropicana shareholders is an Election Form on which a Tropicana shareholder of record can specify the number of shares of Tropicana Common Stock which he desires to have converted into Series A Preference Stock in the Merger ("Stock Election") and the number of shares of Tropicana Common Stock which he desires to have converted into cash in the Merger ("Cash Election"). Tropicana shareholders who do not intend to vote in favor of the Merger should nevertheless give consideration to filing an election in order to avoid being treated as a nonelecting shareholder in the event that the Merger is approved by the Tropicana shareholders and consummated. In order to be valid, an Election Form must be completed in accordance with the instructions contained therein and returned, together with the certificates for the shares of Tropicana Common Stock for which elections have been made, to one of the agents named therein ("Exchange Agent") not later than the close of business (5:00 P.M.) on July 5, 1978 ("Election Date"). Any record holder of Tropicana Common Stock may at any time prior to the close of business on the Election Date change his election by written notice to the Exchange Agent accompanied by a properly completed revised Election Form or withdraw his election and his certificates for Tropicana Common Stock previously deposited with the Exchange Agent by written notice to the Exchange Agent. Any shareholder of Tropicana who shall have deposited certificates for shares of Tropicana Common Stock with the Exchange Agent shall again have the right to withdraw such certificates by written request and thereby revoke his election at any time after the expiration of the period of 30 days following the Election Date if the Merger shall not have been consummated prior thereto.

If Stock Elections are received for 60% or less of the outstanding shares of Tropiciana Common Stock, all shares covered by such elections will be converted into Series A Preference Stock in the Merger. If Cash Elections are received for 48% or less of the outstanding shares of Tropicana Common Stock, all shares covered by such election will be converted into cash in the Merger.

If Stock Elections are received for more than 60% of the outstanding shares of Tropicana Common Stock, all shares of Tropicana Common Stock owned by non-electing shareholders will be converted into cash in the Merger and the shares for which Stock Elections were made will be converted into Series A Preference Stock and cash pro rata in the Merger in the following manner:

shareholders who tendered their shares simply acquire the right to withdraw those shares from the depository. Indeed stripped of its somewhat breathless language,

Footnote Continued

[1237] (a) a stock proration factor will be determined by dividing the total number of shares for which stock was elected into the maximum number of shares to be converted into stock in the Merger.

(b) the number of shares of each stock-electing shareholder to be converted into Series A Preference Stock in the Merger will be determined by multiplying the stock proration factor times the total number of shares for which such shareholder made a Stock Election; and

(c) the remaining shares for which such shareholder made a Stock Election will be converted into cash in the Merger.

If Cash Elections are received for more than 48% of the outstanding shares of Tropicana Common Stock, all shares of Tropicana Common Stock owned by non-electing shareholders will be converted into Series A Preference Stock in the Merger and shares for which Cash Elections were made will be converted into cash and Series A Preference Stock pro rata in the Merger in the following manner:

(a) a cash proration factor will be determined by dividing the total number of shares for which cash was elected into the maximum number of shares to be converted into cash in the Merger.

(b) the number of shares of each cash-electing shareholder to be converted into cash in the Merger shall be determined by multiplying the cash proration factor times the total number of shares for which such shareholder made a Cash Election; and

(c) the remaining shares for which such shareholder made a Cash Election will be converted into Series A Preference Stock in the Merger.

Any shares of Tropicana Common Stock owned by Beatrice at the Effective Time of the Merger will be excluded in determining the cash proration factor. For all other purposes any shares of Tropicana Common Stock owned by Beatrice at the Effective Time of the Merger shall be treated as outstanding shares for which a Cash Election was made, notwithstanding the fact that all such shares will be cancelled in the Merger.

If any cash or stock prorations are required to be made, they will be implemented by utilizing a uniform rule for rounding designed to avoid the creation of any fractional shares as a result thereof. It is anticipated that a fractional share will be rounded up to the nearest whole share for conversion into cash and rounded down to the nearest whole share for conversion into stock.

Any person who is shown as a record holder of Tropicana Common Stock on Tropicana's stock transfer records at the Effective Time of the Merger who does not make a valid election prior to the Election Date will be treated as a non-electing shareholder of Tropicana. If shares of Tropicana Common Stock owned by non-electing shareholders are not converted in the Merger under one of the two contingencies described above, all such shares will be converted into cash in the Merger if the sum of such shares plus the number of shares for which Cash Elections are received does not exceed 48% of the outstanding shares of Tropicana Common Stock. If such sum would exceed 48% of the outstanding shares of Tropicana Common Stock, names of non-electing shareholders will be drawn by lot and all shares of Tropicana Common Stock owned of record by those selected will be converted into cash in the Merger. Such selection by lot will cease when the sum of shares converted in that manner plus the number of shares for which Cash Elections are received is as close as is practicable to 48% of the outstanding shares of Tropicana Common Stock. All shares of Tropicana Common Stock owned by non-electing shareholders whose names are not drawn by lot will be converted into Series A Preference Stock in the Merger.

Reasons for the Merger and Basis of the Terms

The Boards of Directors of Beatrice and Tropicana have approved the Merger and recommend it to their respective stockholders.

Beatrice's management and Board of Directors believe that the transaction is beneficial to Beatrice because it will enable Beatrice to enter a new field which in their judgment has favorable growth prospects.

Tropicana's management and Board of Directors believe that the transaction is advantageous to its shareholders because (i) it enables them to receive Series A Preference Stock and to thereby obtain a preferred position as to earnings and assets in a more diversified and larger company, (ii) the exchange ratio for the Series A Preference Stock will provide Tropicana shareholders a higher annual dividend than that currently paid on the Tropicana Common Stock to be surrendered and (iii) as part of the Merger the Tropicana shareholders will have the right to elect cash, subject to the limitations described in "The Proposed Merger—Manner and Basis of Converting Shares". Moreover, to the extent the Tropicana shareholders receive Series A Preference Stock in exchange for their Tropicana Common Stock, the transaction will be a tax-free exchange. See "The Proposed Merger—Tax Consequences". In connection with the Merger, Tropicana retained the investment banking firm of Lehman Brothers Kuhn Loeb Incorporated ("Lehman") to act as its financial adviser. Lehman has rendered to the Board of Directors of Tropicana an opinion that the terms of the Merger Agreement are fair and equitable to Tropicana's shareholders from a financial point of view, i.e., that the financial consideration to be exchanged for shares of Tropicana Common Stock in the Merger is fair to such shareholders. The full text of Lehman's opinion is attached hereto as Annex II. [1238] The opinion sets forth the matters considered by Lehman and should be read in its entirety by all shareholders of Tropicana. In preparing its opinion, Lehman relied upon Tropicana and Beatrice with respect to accuracy and completeness of information provided by each company without independent verification. Tropicana has agreed to pay Lehman $750,000, including Lehman's expenses and certain legal fees, if the Merger is consummated, and to reimburse Lehman for its reasonable out-of-pocket travel expenses if the Merger is not consummated. In addition, Tropicana has agreed to indemnify Lehman against certain liabilities, including certain liabilities under the federal securities laws.

Tropicana's memorandum of August 2 asserts nothing more. That Tropicana may disapprove of some of the potential purchasers for shares of withdrawing shareholders is hardly a legally-cognizable injury.

CONCLUSION

We submit that this Court should maintain its injunctive orders in effect to afford opportunity for briefing of the merits of this appeal, on an expedited schedule should the Court deem it appropriate. Failing that, at the minimum an opportunity should be afforded for supplemental memoranda addressing appellant's motion for an injunction pending appeal on the basis of the newly-entered findings and conclusions.

Respectfully submitted,

VII

Later on August 4, 1978, the designated motions panel (Judge McGowan not participating) issued the following Order affirming the Judgment of the District Court and continuing the injunction until 12:00 o'clock noon, August 7, 1978, to permit the Commission to apply to the Supreme Court for further stay to allow possible petition for certiorari.

Before McGOWAN*, MACKINNON and ROBB, *Circuit Judges.*

ORDER

Upon consideration of the Findings of Fact and Conclusions of Law filed this day in response to the remand of the record by this Court, and the Commission's memorandum concerning appellate review filed this day, and upon consideration of the entire record, it appearing that these Findings and Conclusions fully support the District Court's earlier findings of ultimate facts and conclusions of law and also support the conclusions reached by this Court in its Memorandum of August 2, 1978, following our examination of the entire record, including the transcript of the District Court hearings, and it further appearing that this appeal involves the denial of the petition for preliminary injunction; it is

ORDERED by the Court that further rehearing by the panel of this Court is denied, the order and judgment of this panel of August 2, 1978 are reinstated except that the injunction previously granted by this Court is extended to expire at 12:00 o'clock noon August 7, 1978, and the judgment of the District Court on appeal in No. 78-1673 is hereby affirmed.

Per Curiam.

VIII

Shortly after the issuance of the foregoing order the Federal Trade Commission delivered the following letter to the Clerk of this Court.

*Judge McGowan did not participate in this order.

August 4, 1978

United States Court of Appeals
for the District of Columbia
United States Courthouse
Washington, D.C.

Re: Federal Trade Commission, Appellant v. Beatrice Foods Co. and Tropicana Products, Inc., Appellees, Appellate Nos. 78-1535 & 78-1673

Your Honors:

The Federal Trade Commission will not seek review of the Court's August 4, 1978 [1239] Order in this matter nor will the Commission attempt further in either this Court or the United States Supreme Court to prevent consummation of the merger of Tropicana Products, Inc. into Beatrice Foods Company.

Accordingly, the Federal Trade Commission suggests to this Court that its injunction preventing this merger until 12 noon Monday, August 7, 1978 be lifted immediately, and the merger be allowed to be consummated without further delay. And, therefore, we hereby so move to that effect.

Respectfully submitted,

/s/ Mark L. Davidson
MARK L. DAVIDSON
Assistant Director
Bureau of Competition
and one of the Attorneys for
appellant Federal Trade Commission

IX

Counsel for appellees meanwhile had delivered an Agreed Motion to Parties for Modification of the Court's August 4, 1978 Order "to permit the merger to go forward instanter."

AGREED MOTION FOR MODIFICATION OF ORDER OF AUGUST 4, 1978

NOW COME the Appellees, Beatrice Foods Co. and Tropicana Products, Inc., and move the court for an order modifying its order of August 4, 1978 for the reasons stated below.

Appellees have been informed by counsel for the Federal Trade Commission that the Commission does not intend further appeal of this court's orders of August 2 and 4, 1978, affirming the district court's denial of a preliminary injunction and dismissing the complaint. Appellees, therefore, respectfully request that this court modify its order of August 4, 1978, to permit the subject merger to go forward instanter.

Counsel for the Commission has authorized us to represent to the court that the Commission does not object to a grant of the relief requested herein.

X

Later in the evening of August 4, 1978, the FTC delivered the following letter to the Clerk of this Court.

August 4, 1978

BY HAND

United States Court of Appeals
for the District of Columbia
United States Courthouse
Washington, D.C. 20580

Re: Federal Trade Commission, Appellant v. Beatrice Foods Co. and Tropicana Products, Inc., Appellate Nos. 78-1635 and 78-1673

Your Honors:

In our hand-delivered letter, addressed to this Court, of today's date, we advised that it was the Commission's wish to permit prompt consummation of the merger of Tropicana Products, Inc. into Beatrice Foods Co. However, this expression of the Commission's intention was premised upon the misapprehension that this Court had ruled not only on the Commission's Petition for Rehearing but also upon its Suggestion for *En Banc* Reconsideration. In a telephone conversation this evening with Judge MacKinnon of this court, we were advised that the Court has not as yet ruled upon the Suggestion for *En Banc* Reconsideration. It is the Commission's wish that such reconsideration be had and that a ruling on its suggestion be made.

Accordingly, we hereby advise this Court that the Commission wishes to withdraw the motion made today by letter of August 4, 1978 and opposes any lifting of the injunction presently in force preventing consummation of the challenged merger until this Court has ruled upon the Commission's Petition and Suggestion for *En Banc* Reconsideration.

Respectfully submitted,

/s/ Mark L. Davidson
MARK L. DAVIDSON
Assistant Director
Bureau of Competition
and one of the Attorneys for
appellant Federal Trade Commission

[1240] In view of this latter letter withdrawing consent to an immediate merger no action was taken upon the appellees' motion to authorize the immediate completion of the acquisition.

XI

At 12:00 o'clock noon, on August 7, 1978, the stay previously granted having expired, and no stay having been requested from the Supreme Court, the parties were free to complete this acquisition.

BRISTOL-MYERS CO.
v.
FEDERAL TRADE COMMISSION et al.*

Civ. A. No. 78-1370. F.T.C. Docket No. 8917.

(United States District Court, District of Columbia, September 22, 1978)

In denying plaintiff's motion for a preliminary injunction or a temporary restraining order to prevent FTC from introducing an FDA panel report into its administrative proceeding involving plaintiff's product claims until plaintiff could depose, cross-examine or subpoena the authors of the report, court held that plaintiff had failed to demonstrate either a likelihood of success on the merits, or the irreparable injury necessary to justify court's intrusion into the administrative process.

Stephen A. Weitzman, Washington, D.C., for plaintiff.
Florence E. Abrams, Washington, D.C., for defendants.

Before FLANNERY, *District Judge.*

MEMORANDUM OPINION AND ORDER

This case came before the court on plaintiff's motion for a Temporary Restraining Order. Plaintiff originally filed a motion for a preliminary injunction, but filed the Motion for a Temporary Restraining Order to advance the hearing date. The court will consider the motions together as a motion for a preliminary injunction, because all parties are before the court and have received the notice and hearing called for by Federal Rule of Civil Procedure 65(a).

The plaintiff is involved in a Federal Trade Commission adjudicatory proceeding, FTC Docket No. 8917, involving alleged false advertising in the promotion of its products. The Commission plans to introduce into the proceeding a report—the Panel Report of the FDA Advisory Review Panel on Over-the-Counter Internal Analgesics, Antipyretic, and Anti-Rheumatic Products ("CX-514".) Plaintiff contends that this report is hearsay and seeks an injunction preventing the introduction of the report until plaintiff has an opportunity to depose and cross-examine the authors of the report, or unless plaintiff is permitted to subpoena the authors as its own witnesses.

The Panel Report apparently contains unfavorable references to Bufferin, Excedrin, and Excedrin PM. (Davis aff., at 2.) Complaint counsel will call witnesses to discuss the report, and cross-

*Not reported in the Federal Reporter. Reported in Trade Reg. Rep. ¶ 62,270 at 75,675 (1978-2 Trade Cases).

examination of these witnesses will be permitted. The Administrative Law Judge has refused, however, to allow plaintiff to cross-examine, depose, or subpoena the actual authors of the report. The plaintiff asserts that this decision violates its constitutional and statutory rights to cross-examine the authors of hearsay evidence.

Plaintiff claims that the Panel Report is biased,[1] and that it contains numerous errors and ambiguities.[2] Moreover, the numerous citations and explanations in the Report of the basis for the Panel's conclusions are allegedly inadequate, so that the Report is not a "self-contained" document that can be evaluated without other evidence. Plaintiff therefore wishes to subpoena the authors of the document and to subject the authors to an extensive series of questions directed at the validity of the conclusions expressed in the report and the possibility of outside influence. The proposed questioning would involve the authors of the report and probably other witnesses.[3] The questioning would be extensive, as the following quotations from plaintiff's motion reveal:

(1) For example, how strongly does *each member* truly feel about the conclusions unqualifiedly expressed in the report?

Plaintiff's Memorandum of Points and Authorities, at 10.

(2) Plaintiff must be allowed to determine the extent to which, and with what weight, the Panel members applied or failed to apply, or varied from, the various factors and criteria specified by FDA for the Panel's use. Were they influenced by FDA staff, or others? If so, what was the extent of that influence? Who attended the Panel's meetings, both open and closed? Who advised them, drafted minutes and drafted the report, or revised or reviewed either of them; and with what affect [sic] upon the Panel members' conclusions? What evidence was considered and rejected because of the Panel members' own belief and predilection in the analgesics field, or because of other unknown or unstated factors. Why were some materials rejected? What outside influences came to bear and cause revisions of the report?

For example, it is known that the 27th meeting of the Panel was a phone conference of the Panel members and Dr. Beaver, apparently related to Bufferin. After that conference the draft report concerning Bufferin was changed to one far less favorable to that product. The report is silent as to the reasons for the change. Plaintiff must be allowed an opportunity to show, by cross-examination, that those changes were made without adequate basis, and that the report and its conclusions are unduly biased; and to develop why the Panel members ignored a respectable and substantial body of scientific evidence.

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[1] Plaintiff's Memorandum of Points and Authorities, at 3—6. According to plaintiff, there may have been behind-the-scenes intrusion by FTC staff members into the panel deliberations, manipulation of the Panel by a Dr. William Beaver, and numerous other contacts between FTC attorneys and Panel members.

[2] *Id.* at 12—18.

[3] Counsel for plaintiff stated at the hearing on this matter that the authors would be deposed as a beginning. If this led to other witnesses, they too would be deposed.

Plaintiff's Memorandum of Points and Authorities, at 4-5.

The court notes that the published Panel Report took up over 150 pages in the *Federal Register* when finally published, and that it went through numerous drafts. The court further notes that the draft reports and numerous other documents prepared or employed by the Panel are the subject of a Freedom of Information Act, 5 U.S.C. § 552, lawsuit before this court, involving thousands of pages of documents. *Bristol-Myers Co.* v. *Kennedy* CA 77-2122. Finally, the court notes that *none* of the doctors who prepared the report would consent to appear voluntarily on plaintiff's behalf.

After considering the arguments on both sides, the supporting documents, and the record in this case, the court concludes that the motion for a preliminary injunction must be denied. To grant the motion would inject the court into an ongoing adjudication because of an evidentiary question. It would stop the adjudication for months, or prevent the Commission from using relevant evidence. Moreover, it would subject five unwilling doctors to the very extensive grilling that plaintiff contemplates. Plaintiff has failed to demonstrate either a likelihood of success on the merits or the irreparable damage necessary to justify such intrusion into the administration process.

Discussion

The court concludes that this action is reviewable. Plaintiff has alleged a colorable claim that its constitutional rights are being violated without redress. *Amos Treat & Co. v. SEC,* 306 F.2d 260 (D.C. Cir. 1962).

In evaluating plaintiff's request for a preliminary injunction. the court employed the familiar criteria spelled out in *Virginia Petroleum Jobbers Association v. Federal Power Commission,* 259 F.2d 921 (D.C. Cir. 1958):

(1) The likelihood that plaintiff will prevail on the merits;

(2) The possibility of irreparable injury to the plaintiff if the preliminary injunction is denied;

(3) The possibility of substantial harm to other persons if the injunction is granted; and

(4) The public interest.

The court feels that it is not likely that plaintiff will prevail on the merits. Plaintiff is correct in stating that the right to cross-examine witnesses is a fundamental aspect of procedural due process. *Richardson v. Perales,* 402 U.S. 389 (1971); *Goldberg v. Kelly,* 397 U.S. 254 (1970). The question presented here, however, concerns the *scope* of the right to cross-examine. Under the Administrative Pro-

cedure Act, a party is entitled in an adjudicatory context "to conduct cross-examination as may be required for a full and true disclosure of the facts." 5 U.S.C. § 556(d). The right to cross-examine is not unlimited, and the scope of cross-examination is ordinarily within the sound discretion of the Administrative Law Judge, both because he is most familiar with the case and because administrative agencies have more leeway in applying the rules of evidence than do the courts, *American Public Gas Association v. FPC*, 498 F.2d 718, 723 (D.C. Cir. 1974); *Loesch v. FTC*, 257 F.2d 882, 884 (4th Cir. 1958), *cert. denied*, 358 U.S. 883 (1958); *Delaware River Port Authority v. Tiemann*, 403 F.Supp. 1117, 1141 n. 68 (D.N.J. 1975), *vacated on other grounds*, 531 F.2d 699 (3d Cir. 1976). Moreover, hearsay is admissible in administrative proceedings. *School Board of Broward County, Florida v. Department of HEW*, 525 F.2d 900, 905-06 (5th Cir. 1976); *Marvin Tragash Co. v. USDA*, 524 F.2d 1255, 1258 (5th Cir. 1975).

In this case, the Commission will introduce the Panel Report to demonstrate that a substantial question exists in the minds of experts as to the claims made regarding plaintiff's products. The court believes that questioning *each member* of the Panel to determine his or her views on the opinions unqualifiedly expressed in the report would not enable plaintiff to demonstrate conclusively that no "substantial question" exists. Indeed, many of the scientists are dead. Neither their views nor their knowledge of alleged "improper influences" would lay the matter to rest. Moreover, the Commission is not preventing plaintiff from cross-examining any witnesses that are used to discuss the report, or from introducing experts of its own to attack the report. The Commission is merely precluding plaintiff from deposing the authors of the report or from calling them as witnesses to examine the origins of the Panel Report.

It may be that this court, in its discretion, would have permitted the plaintiff to conduct a limited cross-examination of the authors of the Panel Report. The court cannot conclude, however, that the Administrative Law Judge was clearly wrong as a matter of law on this evidentiary question. It would require more than general precatory statements about the importance of cross-examination for the court to interject itself into an ongoing adjudication and order a protracted examination of the deliberative process leading to the Panel Report.

Nor does the court feel that plaintiff will be irreparably harmed by the denial of a preliminary injunction. The plaintiff asserts that the loss of memory over time, coupled with the possibility that notes will be lost or destroyed before a possible reversal of the ALJ's decision, will irreparably damage its ability to attack the credibility of the report. Counsel for the defendants indicated, however, that four out of five of the living authors already have disposed of their notes, and

plaintiff's counsel represented at the hearing on this matter that the authors already claim that their memories are somewhat foggy. Most of the claimed irreparable harm, therefore, has already occurred, and the court does not feel that the remainder is so substantial as to warrant injunctive relief. As for the possibility of an adverse decision at the FTC, judicial review is available.

It is clear that the issuance of a preliminary injunction would harm other parties and be against the public interest. An injunction would stop the adjudication at the Federal Trade Comission for the entire time that the extensive discovery called for by plaintiff would require. The Food and Drug Administration asserted through Dr. Grout that extensive discovery and compulsory process of the agency's experts would adversely affect the FDA's ability to attract highly qualified experts for its periodic advisory panels.

Order

Upon consideration of the plaintiff's motion for a preliminary injunction and the opposition thereto, the oral argument thereon and the record in this case, and in accordance with the above Memorandum Opinion, it is, by this court, this 22nd day of September, 1978,

Ordered that plaintiff's motion for a preliminary injunction or for a temporary restraining order shall be and the same hereby is, denied.

In re FTC LINE OF BUSINESS REPORT LITIGATION*

Nos. 77-1728 et al. F.T.C. File Nos. 99-196, 99-199, 99-318.

In re FTC CORPORATE PATTERNS REPORT LITIGATION*

Nos. 77-1732 et al. F.T.C. File Nos. 99-281, 99-287, 99-309.

(United States Court of Appeals, District of Columbia Circuit, September 28, 1978)

Court denied FTC motion for issuance of its July 10, 1978 judgment, 595 F.2d 685 (1978), which affirmed District Court's orders directing compliance with FTC Special Report programs and issued an order, *sua sponte*, staying its judgment pending the Supreme Court's disposition of three petitions for certiorari directed to its mandate. Court held that it would have granted such a stay, had it been filed by appellants. However, when the Clerk of the Court, pursuant to the *D.C. Handbook of Practice & Internal Procedures*, 70, 74-75 (1978), withheld entry of the judgment upon notification that the petition for certiorari had been filed, appellants failed to request a stay in the mistaken belief that non-issuance, alone, would stay the judgment.

Before BAZELON and ROBINSON, *Circuit Judges*, and AUBREY E. ROBINSON, JR. †, *District Judge*, United States District Court for the District of Columbia.

ORDER

Upon consideration of the motion of the Federal Trade Commission for issuance of the mandate herein, and of the memoranda in support of and in opposition to the motion, it is, for the reasons expressed in the accompanying memorandum,

ORDERED by the Court that the motion for issuance of the mandate be and hereby is denied; and it is

Further ORDERED by the Court, *sua sponte*, that the District Court's orders reviewed herein be and hereby are stayed pending action by the Supreme Court of the United States upon the petitions for writs of certiorari directed to this Court's judgment of July 10, 1978.

Per Curiam

MEMORANDUM

On July 10, 1978, we affirmed a judgment of the District Court which directed compliance with orders that the Federal Trade Commission seeks to have enforced in these companion cases.[1] Eighteen

*Not otherwise reported.

† Sitting by designation pursuant to 28 U.S.C. § 292(a) (1976).

[1] *In re FTC Line of Business Report Litigation*, No. 77-1728, *In re FTC Corporate Patterns Report Litigation*, No. 77-1732 (D.C. Cir. July 10, 1978).

days later, the Clerk of this court was notified that three petitions have been filed in the Supreme Court directed to our action.[2] In cases wherein a petition for certiorari is presented within 21 days from the entry of judgment here,[3] it has long been the Clerk's policy to automatically withhold the mandate pending disposition of the petition.[4] That course he pursued in the instant litigation.

The Commission has moved for issuance of the mandate, contending that the Clerk's practice is contrary to Rule 41 of the Federal Rules of Appellate Procedure[5] and Rule 14(b) of the General Rules of this court.[6] Appellants, on the other hand, defend the practice, and indicate that they relied on it in deciding not to request that the mandate be stayed.

I

As a panel confronted with a procedural policy of general applicability, we normally would refer this problem to the full court for resolution. Since, however, a majority of our regular active judges have recused themselves from participation in these cases,[7] it is obviously inappropriate to solicit their guidance at this time on a ques-

[2] *American Air Filter Co. v. FTC*, No. 78-167 (July 28, 1978); *Goodyear Tire & Rubber Co. v. FTC*, No. 78-168 (July 28, 1978); *Deering Milliken, Inc. v. FTC*, No. 78-169 (July 28, 1978). See also 47 U.S.L.W. 3070 (1978).

[3] See Fed. R. App. P. 41(b), quoted *infra* note 5.

[4] See D.C. Cir. Handbook of Practice & Internal Procedures 70, 74-75 (1978), stating relevantly:

> [A] petition for certiorari to the United States Supreme Court, filed within the 21-day period, suspends issuance of the "mandate" until the case is disposed of in the Supreme Court.
>
> * * * * * * *
>
> A petition for certiorari filed before the mandate of this Court is issued stays the mandate until the Supreme Court disposes of the case. This Court upon motion may also stay its mandate prior to the filing of a petition for certiorari....If a petition for certiorari is filed within the term of the stay, the stay continues until the case is disposed of by the Supreme Court. Upon denial of the petition for certiorari, this Court's mandate is to be issued immediately.

[5] Fed. R. App. P. 41 states:

> (a) Date of Issuance. The mandate of the court shall issue 21 days after the entry of judgment unless the time is shortened or enlarged by order. A certified copy of the judgment and a copy of the opinion of the court, if any, and any direction as to costs shall constitute the mandate, unless the court directs that a formal mandate issue. The timely filing of a petition for rehearing will stay the mandate until disposition of the petition unless otherwise ordered by the court. If the petition is denied, the mandate shall issue 7 days after entry of the order denying the petition unless the time is shortened or enlarged by order.
>
> (b) Stay of Mandate Pending Application for Certiorari. A stay of the mandate pending application to the Supreme Court for a writ of certiorari may be granted upon motion, reasonable notice of which shall be given to all parties. The stay shall not exceed 30 days unless the period is extended for cause shown. If during the period of the stay there is filed with the clerk of the court of appeals a notice from the clerk of the Supreme Court that the party who has obtained the stay has filed a petition for the writ in that court, the stay shall continue until final disposition by the Supreme Court. Upon the filing of a copy of an order of the Supreme Court denying the petition for writ of certiorari the mandate shall issue immediately. A bond or other security may be required as a condition to the grant or continuance of a stay of the mandate.

[6] "A petition for a stay of the issuance of mandate shall not be granted simply upon request. A stay shall not issue unless the petition sets forth facts showing good cause for the relief sought." D.C. Cir. Gen. Rule 14(b) (1978).

[7] For the information of counsel we noted this fact in our judgment disposing of the appeals.

tion impacting the litigation so directly.[8] Moreover, there is no need for anyone to undertake at this time a resolution of the procedural dilemma the parties have posed, for it is clear to us that were there a motion for stay of the mandate we would be obliged to grant it. We have examined the petitions for certiorari and find that the issues they tender are substantial; resultantly, we must conclude that there exists good cause to justify staying the mandate pending disposition of the petitions. We say this without any inclination toward issuance of such a stay *sua sponte*. Rather, our purpose is to point out that there is no occasion to consider the propriety of the Clerk's automatic retention of the mandate when it is evident in the circumstances here that a stay would be available merely for the asking.

We thus leave the Clerk's action undisturbed, but we hasten to make plain our view that the consequence is simply that the mandate will not issue immediately, and not that appellants could not be called upon to respond to the Commission's directives while the petitions for certiorari are pending. When we ordered replies to the Commission's motion, we instructed all parties to address

> the relationship between a stay of issuance of the mandate and the operation of the District Court's orders granting enforcement of the Federal Trade Commission's report orders; and [the] effect, if any, . . . a stay of the mandate [would] have on the enforcement of the Commission's orders[.][9]

To insure that no one will be misled by our disposition of the motion, we elucidate the course of our reasoning on that score.

II

The starting point is a resume of the events operative in this connection. The District Court entered final judgment directing obedience to the Commission's Line of Business Report orders within 150 days and with the Corporate Patterns Report orders within 90 days, subject to any extensions by the Commission. The District Court denied motions for stays of these orders pending appeals to this court and we, in turn, did likewise. An application for a stay was thereafter made to the Supreme Court, but only in the *Corporate Patterns Report* case. A temporary stay was granted by Chief Justice Burger, and somewhat later Justice Brennan extended the stay pending "final disposition" of the appeal in that case by this court.

During oral argument before us, appellants urged reconsideration of their motion in this court for a stay of the District Court's enforcement order respecting the Line of Business Report program. After in-

[8] With the problem adjudicated for the instant cases by today's action, we will ask the Judicial Council for this circuit to settle it for the future. See 28 U.S.C. § 332(d) (1976).

[9] *In re FTC Line of Business Report Litigation*, *supra* note 1 (order of Aug. 3, 1978).

itial Commission extensions of the compliance deadline therefor, we issued a stay until further order to preserve the status quo while the litigation was under submission. When, subsequently, our opinion and judgment affirming the District Court were announced, we directed compliance with the District Court's orders within 30 days thereafter. Within the 30-day period, we granted another stay of those orders to enable consideration of the Commission's motion for issuance of the mandate.

III

Thus coming to the fore is the question whether the Clerk's withholding of the mandate of this court itself operates to stay compliance with the District Court's enforcement orders in these cases. Appellants have foregone any request for a further stay of these orders in the apparent belief that non-issuance of the mandate, standing alone, will have that effect. We do not share that view.

It is well established that the District Court is without jurisdiction to alter a judgment of its own while an appeal therefrom is ongoing.[10] But it is equally clear that the vitality of that judgment is undiminished by pendancy of the appeal. Unless a stay is granted either by the court rendering the judgment or by the court to which the appeal is taken, the judgment remains operative.[11] To be sure, for as long as the appellate court retains its mandate it maintains its jurisdiction over the case,[12] and thus the power to alter the mandate.[13] But non-issuance of the mandate by the appellate court has no im-

[10] *Smith v. Pollin*, 90 U.S.App.D.C. 178, 179, 194 F.2d 349, 350 (1952); *Bush v. United Benefit Fire Ins. Co.*, 311 F.2d 893, 894 (5th Cir. 1963); *Asher v. Harrington*, 461 F.2d 890, 895 (7th Cir. 1972); *In re Fed. Facilities Realty Trust*, 227 F.2d 651, 653-654 (7th Cir. 1955); *Janousek v. Doyle*, 313 F.2d 916, 920 (8th Cir. 1963); *Merritt-Chapman & Scott Corp. v. City of Seattle*, 281 F.2d 896, 898-899 (9th Cir. 1960); *Petusky v. Rampton*, 431 F.2d 378, 381 (10th Cir. 1970), *cert. denied*, 401 U.S. 913, 91 S.Ct. 882, 27 L.Ed.2d 812 (1971); see generally 9 J. Moore, Federal Practice ¶ 203.11, at 734-736 (2d ed. 1948).

[11] *Hovey v. McDonald*, 109 U.S. 150, 161 (1883) ("an appeal from a decree granting, refusing or dissolving an injunction does not disturb its operative effects"); *Gullett v. Gullett*, 85 U.S.App.D.C. 12, 14, 174 F.2d 531, 533 (1949); *Weston Lighting Corp. v. Smoot-Holman Co.*, 352 F.2d 1019, 1020-1021 (9th Cir. 1965); *United States v. City of Chicago*, 411 F.Supp. 218, 246 (N.D. Ill. 1976), *modified*, 549 F.2d 415 (7th Cir. 1977). See also 9 J. Moore, Federal Practice ¶ 208.03, at 1407-1408 (2d ed. 1948):

> The only consequence of failing to obtain a stay is that the prevailing party may treat the judgment of the district court as final, notwithstanding that an appeal is pending. If the judgment awards money or property, it may be executed upon unless stayed; if it awards an injunction, the injunction is effective unless stayed; if it refuses an injunction, the prevailing party may engage in the conduct that was sought to be restrained unless an injunction pending appeal is obtained . . ..

(footnotes omitted).

[12] *Burget v. Robinson*, 123 F. 263, 264 (1st Cir.), *cert. denied*, 188 U.S. 739, 23 S.Ct. 848, 47 L.Ed. 677 (1963); *Alphin v. Henson*, 552 F.2d 1033, 1035 (4th Cir.), *cert. denied*, 434 U.S. 823, 89 S.Ct. 67, 54 L.Ed.2d 90 (1977); *Meredith v. Fair*, 306 F.2d 374, 376 (5th Cir.), *order enjoining interference with Court of Appeals mandate and vacating stay*; 83 S.Ct. 10, 9 L.Ed.2d 43 (Black, J., in chambers), *cert. denied*, 371 U.S. 828, 83 S.Ct. 49, 9 L.Ed.2d 66 (1962); *Omaha Elec. Light & Power Co. v. City of Omaha*, 216 F. 848, 855 (8th Cir. 1914).

[13] *Burget v. Robinson*, *supra* note 12, 123 F. at 264; *Omaha Elec. Light & Power Co. v. City of Omaha*, *supra* note 12, 216 F. at 856.

pact on the trial court's powers to enforce its unstayed judgment since the latter court has retained that power throughout the pendency of the appeal.[14]

We could, of course, vacate our current stay of the District Court's orders and thereby restore that court's ability to enforce it. We are constrained, however, under the present circumstances to continue the stay until such time as the Supreme Court disposes of the petitions for writs of certiorari. When, shortly after the cases arrived here, we denied appellants' motions for stays, it was our view that the impediment to the Commission's statutory obligations resulting from materially delayed implementation of these reporting programs outweighed any injury feared by appellants, but conditions have since changed significantly. The appellate process in this court has been completed; the questions presented to the Supreme Court, as we have said, are substantial; and the likelihood is that Supreme Court action on the petitions is relatively near at hand. In light of that Court's decision to issue a stay in *Corporate Patterns Report* for the duration of the appeal here, refusal to further stay the orders in these cases for the ostensibly short period prior to Supreme Court disposition of the petition hardly seems indicated. In sum, we think the balance of the equities now favors a continued stay of the District Court's orders—so much so that we should act *sua sponte*.

[14] See authorities cited *supra* note 11.

UNITED STATES v. O.K. TIRE & RUBBER CO.*

Civ. No. 1-74-152. F.T.C. Docket No. 8571.

(United States District Court, District of Idaho, September 29, 1978)

In dismissing a civil penalties action charging a tire manufacturer with violating a 1964 F.T.C. consent order prohibiting interference with dealers' independent choice of products they wished to handle, and awarding litigation costs to prevailing defendant, court held that plaintiff had failed to prove that manufacturer had cancelled franchise agreements of five dealers for any reason other than contractual default.

For plaintiff: *Raymond W. Phillips,* Antitrust Div., Dept. of Justice, Washington, D.C., and *Joseph Eckhaus,* Bureau of Competition, F.T.C., Washington, D.C.

For defendant: *Ray S. Bolze* and *William J. Hunter, Jr.,* of Howrey & Simon, Washington, D.C.

Before McNichols, *District Judge.*

This action came to trial before the Court sitting without a Jury on September 25, 1978. Oral and documentary evidence was received. A very comprehensive Pretrial Order containing many agreed facts was entered. A large number of items of documentary evidence on behalf of both parties was stipulated into evidence. At the close of the formal presentation of plaintiff's case in chief, and after plaintiff announced that plaintiff rested, defendant moved for dismissal as provided in Rule 41(b), Federal Rules of Civil Procedure.

Extended argument was afforded at the end of which the Court granted the Motion to Dismiss, orally explicating his reasoning therefor.

In accordance with Rule 41(b) the Court enters the following Findings of Fact and Conclusions of Law:

Findings of Fact

I. The Court adopts, by reference, as though fully set forth herein, all of the agreed facts stipulated to by the parties.

II. The Court finds that jurisdiction is based properly on 28 U.S.C. § 1331(a) and on § 1337.

III. The franchise dealers whose franchises were cancelled by the defendant were in default of the terms of the franchise agreement.

* Not reported in Federal Reporter. Reported in Trade Reg. Rep. ¶ 62,296 at 75,801 (1978-2 Trade Cases). For case before the Commission, see In the Matter of O.K. Rubber Welders, Inc., et al., 65 F.T.C. 1091.

IV. Defendant notified the franchise dealer of the default conditions, and advised that the franchise would be cancelled if the deficiencies were not corrected.

V. The franchisees took no affirmative steps to correct the defaults, and the franchisees remained in default of the franchise agreements.

VI. Defendant cancelled the franchises of five of the defaulting dealers for failure to comply with the terms of their respective franchise agreements.

It is not proved that the defendant cancelled any franchise agreement for any reason other than the failure of the respective franchisee to comply with the terms of the franchise contract.

It is not proved that the defendant entered into or continued any agreement or understanding with any present or prospective O.K. dealer imposing any condition upon any such dealer which interfered with the independent choice of such dealer as to the product he would handle in addition to the product sold by the defendant, O.K.

VII. It is not proved that the defendant refused to enter into, discontinued or threatened to discontinue, any lease, mortgage, franchise, loan, or other agreement, or exercised, or threatened to exercise, any option that any O.K. dealer, in whole or in part, because such dealer refused to handle products which sponsored, recommended, promoted, or approved by the defendant pursuant to a sales commission arrangement between the defendant and any supplier, or because such dealer handled products of any competitor or a supplier with which the defendant had or may have had a sales commission arrangement, or in any way interfered with any right of any dealer to independently decide as to any product he might desire to handle.

VIII. It is not proved that the defendant intimidated or coerced, or attempted to intimidate or coerce, any of the named franchise dealers to purchase any particular brand of tires or other products.

IX. It is not proved that the defendant prevented or attempted to prevent any named franchise dealer from exercising his own independent choice in purchasing, reselling, merchandising, or displaying tires or other products such dealer wanted to handle in addition to the products sold by the defendant.

X. It is not proved that the defendant employed any method of inspecting, reporting, or surveillance of named franchise dealers' purchases for the purpose, or with the intended effect, of enforcing defendant's recommendation to such franchise dealer to handle any sponsored product.

Conclusions of Law

1. The Court has jurisdiction.
2. The defendant did not violate any provisions of the Order of the Federal Trade Commission Consent Order entered into in 1964 and directed to the defendant.
3. Defendant is entitled to have its Motion to Dismiss under Rule 41(b), Federal Rules of Civil Procedure, granted.
4. Costs should be allowed to the defendant.

W. L. WEARLY, INGERSOLL-RAND COMPANY, The TORRINGTON COMPANY *v.* FEDERAL TRADE COMMISSION, et al.*

Civ. No. 77-1860. F.T.C. File No. 99-374.

(United States District Court, District of New Jersey, October 18, 1978)

1. NEW JERSEY, THROUGH INJUNCTIONS AND DAMAGES, HAS LONG PROVIDED RECOGNITION AND PROTECTION TO TRADE SECRETS.

   [590] New Jersey recognizes and gives protection to trade secrets, both by way of injunction and damages.

2. SINCE NEW JERSEY WAS THE HOME OF PARENT CORPORATION AND SITUS OF INTANGIBLE PERSONALTY, NEW JERSEY LAW GOVERNED CHAIRMAN'S ACTION CHALLENGING FTC SUBPOENAS THAT SOUGHT PRODUCTION OF SUBSIDIARY'S DOCUMENTS.

   In action brought by chairman of corporation challenging administrative subpoena issued to chairman for production of certain documents of corporation's wholly owned subsidiary, New Jersey law governed, since parent corporation was a New Jersey corporation and situs of intangible personalty sought by subpoena was New Jersey.

3. UNDER THE FIFTH AMENDMENT, SOVEREIGNTY'S POWER OF EMINENT DOMAIN TO TAKE PROPERTY MAY NEVER BE EXERCISED FOR PRIVATE USE.

   Sovereign power of eminent domain to take property is inherent in sovereignty; but by the Fifth Amendment, it may be exercised for public use only upon just compensation; it may not be exercised for private use at all.

4. ALL GOVERNMENTAL BRANCHES, AGENCIES AND OFFICERS ARE BOUND BY THE FIFTH AMENDMENT.

   The Fifth Amendment applies to all branches, and all agencies and officers of government.

5. WHEN DISCLOSURE OF TRADE SECRETS IS COMPELLED BY GOVERNMENT, FAILURE TO PROVIDE ADEQUATE PROTECTION TO ASSURE THEIR CONFIDENTIALITY AMOUNTS TO AN UNCONSTITUTIONAL "TAKING" OF PROPERTY.

   Failure to provide adequate protection to assure confidentiality of trade secrets when disclosure is compelled by government amounts to an unconstitutional "taking" of property by destroying it, or by exposing it to the risk of destruction by public disclosure or by disclosure to competitors.

6. SINCE A GENUINE CONTROVERSY INVOLVING QUESTIONS OF LAW EXISTED BETWEEN SPECIFIC PARTIES, DECLARATORY JUDGMENT RELIEF WAS PROPER.

   Declaratory judgment relief was proper with respect to action brought by chairman of corporation challenging administrative subpoena issued to chairman for production of certain documents of corporation's wholly owned subsidiary, since genuine controversy between specific parties existed over issues that mainly involved questions of law going to parties' respective rights, duties and legal relations.

7. EVEN WHEN A "TAKING" IS STATUTORILY AUTHORIZED, THE COURTS, NOT ADMINISTRATIVE AGENCIES, DECIDE WHETHER THE "TAKING" IS IN FACT FOR PUBLIC USE, SINCE ONLY THE COURTS ARE CHARGED WITH SEEING THAT THE CONSTITUTION IS HONORED.

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* Reported in 462 F.Supp. 589 (1978). Motion for reconsideration denied November 30, 1978.

It is the courts, not administrative agencies in executive branch, which are charged with seeing that the Constitution is honored; it is the courts, not administrative agencies, that decide whether a "taking," even when authorized by statute, is in fact accomplished for a public use.

8. SINCE F.T.C. HAD NO RIGHT TO DISCLOSE PRIVILEGED INFORMATION CONTAINED IN SOUGHT DOCUMENTS, AND IN LIGHT OF AGENCY'S PRIOR REFUSAL TO PRODUCE DOCUMENTS FOR COURT'S *IN CAMERA* INSPECTION AND THE PROBABILITY OF SIMILAR DISREGARD FOR A DECLARATORY JUDGMENT, COURT WOULD PROVIDE FURTHER RELIEF BUT WOULD RESERVE THE FORM OF SUCH RELIEF UNTIL BOTH SIDES ON THE ISSUE HAD BEEN HEARD.

Where corporate documents sought by Federal Trade Commission contained proprietary information, Commission had no right to make any of the information public or to provide it to a requester under the Freedom of Information Act or any other act; in view of the Commission's prior refusal to comply with court's order for production of certain documents for in camera inspection and the likelihood that a declaratory judgment would be similarly disregarded, district court would grant further relief, but the form of such additional relief would be reserved until such time as district court had heard both sides on the issue.

9. SINCE CHAIRMAN'S CLAIM AROSE UNDER THE FIFTH AMENDMENT, THE FEDERAL TRADE COMMISSION ACT, AND THE DECLARATORY JUDGMENT ACT, DISTRICT COURT HAD FEDERAL QUESTION JURISDICTION OVER THE ACTION.

Federal district court had federal question jurisdiction over action brought by chairman of corporation challenging administrative subpoena issued to chairman for production of certain corporate documents [591] containing proprietary information, since source of corporate chairman's claim arose under the Fifth Amendment, the Federal Trade Commission Act, and the Declaratory Judgment Act.

10. SINCE VENUE WAS PROPER AS TO PARENT CORPORATION, THE "REAL PARTY IN INTEREST," THERE WAS NO REASON TO BAR CORPORATE CHAIRMAN AND SUBSIDIARY FROM JOINING THE ACTION AS PLAINTIFFS.

In action brought by chairman of corporation challenging administrative subpoena issued to chairman for the protection of certain documents of corporation's wholly owned subsidiary, parent company was the "real party in interest" and, since venue was proper as to parent company, there was no reason why corporate chairman and wholly owned subsidiary could not be joined as plaintiffs in the same action.

11. FOR PURPOSES OF FEDERAL RULES OF CIVIL PROCEDURE, F.T.C.'S SUMMARY PROCEEDING FOR A SUBPOENA ENFORCEMENT ORDER WAS A "MANDATORY COUNTERCLAIM."

In action brought by chairman of corporation challenging administrative subpoena issued to chairman for production of certain documents of corporation's wholly owned subsidiary, Federal Trade Commission's summary proceeding for a court order to enforce the subpoena was a "mandatory counterclaim" for purposes of Federal Rules of Civil Procedure.

12. THE ONLY COURT AUTHORIZED TO DECIDE THE ISSUE OF RES JUDICATA IS THE COURT IN WHICH THE CLAIM IS ADVANCED.

The court in which claim of res judicata is advanced is the only court authorized to decide the issue.

13. SINCE SUMMARY PROCEEDING IN DISTRICT OF COLUMBIA NEITHER ADDRESSED NOR DECIDED PRESENT ISSUES, F.T.C. COULD NOT RAISE DEFENSE OF RES JUDICATA ON THE BASIS OF THAT PROCEEDING.

In action brought by chairman of corporation challenging administrative subpoena issued to chairman for production of certain documents of corporation's wholly owned subsidiary, defense of res judicata was not available to Federal Trade Commission on the basis of summary proceeding in District of Columbia culminating in enforcement order, since summary proceeding neither took up nor decided the issues presented in chairman's action.

Chairman of corporation brought action challenging administrative subpoena issued to chairman for production of certain documents of corporation's wholly owned subsidiary. The District Court, Biunno, J., held that where corporate documents sought by Federal Trade Commission contained proprietary information, Commission had no right to make any of the information public or to provide it to a requester under the Freedom of Information Act or any other act; in view of the Commission's prior refusal to comply with court's order for production of certain documents for in camera inspection and the likelihood that a declaratory judgment would be similarly disregarded, district court would grant further relief, but the form of such additional relief would be reserved until such time as district court had heard both sides on the issue.

Order accordingly.

(Syllabus, with substituted captions, taken from 462 F.Supp. 589)

Christiansen, Jube & Keegan by *Sam Radin,* Newark, N.J., for plaintiffs Ingersoll-Rand Co. and The Torrington Co.; *Burns, Van Kirk, Greene & Kafer,* New York City, by *Joseph W. Burns,* New York City, of counsel.

Carpenter, Bennett & Morrissey, Newark, N.J., for plaintiff W. L. Wearly by *David M. McCann,* Newark, N.J.; *Morgan, Lewis & Bockius,* Washington, D.C., by *Miles W. Kirkpatrick,* Washington, D.C., of counsel.

Robert J. Del Tufo, U.S. Atty. by *Donald J. Volkert, Jr.,* Asst. U.S. Atty., Newark, N.J., for defendants; *Mark W. Haase,* Sp. Atty., Washington, D.C., *Arthur W. Adelberg,* Washington, D.C., of counsel.

Before BIUNNO, *District Judge.*

OPINION

BIUNNO, *District Judge.*

This litigation grows out of an administrative subpoena issued to Wearly, who is chairman of Ingersoll-Rand (I-R), which in turn owns all the stock of its subsidiary, Torrington. The subpoena was issued in connection with a non-public investigation designed to look into

the question of antitrust aspects of activities or arrangements conducted through joint ventures, stock acquisitions, and the like. The specific subject matter deals with "needle roller bearings" (NRB) and "loose needle rollers" (LNR).

As everyone knows, there are many kinds of bearings for axles and shafts. The earliest form is the common journal, going back to the wheelbarrow and the wagon. The wheel is of immense value for the physical reason that rolling friction is much lower than sliding friction under most conditions, and since friction causes waste of energy, its reduction increases the efficiency of machines to do useful work.

Even with the development of Babbitt metal for journals, however, sliding friction remained between the shaft and the simple journals. The first important improvement, growing out of technological advances in metallurgy, was the ballbearing. Set between two "races" of hardened steel, [592] the smooth, round and hard steel balls made it possible to substitute rolling friction between shaft and journal.

It will be recalled that at the start of World War II, the nation's railroads had just begun the process of replacing the simple journal box on freight cars with roller bearings, to eliminate breakdowns from "hot boxes" and sharply reduce maintenance.

After the ball bearing, there came roller bearings, tapered and double tapered roller bearings, thrust bearings, and eventually the needle roller bearing. Each of these forms of bearing are variations of the basic concept of substituting rolling friction for sliding friction. Each form is designed to deal with the wide range of loads and stresses encountered in all kinds of machines that have rotating axles or shafts. The list of applications is no doubt enormous ranging from the bicycle, through the many devices with shafts in automobiles, refrigerators, washing machines, oil burners, attic fans, and other appliances, through manufacturing equipment such as turret lathes and milling machines, to sophisticated gyroscopes for space craft with rotational speeds of 10,000 r.p.m. or more.[1]

The defendants, who are the Federal Trade Commission and its members, issued the subpoena involved not to I—R or Torrington, but to Mr. Wearly, chairman of I—R. Since the non-public investigation is directed to corporate activity, the reason for addressing Mr. Wearly is obscure. Various responses at the hearings suggest that the reason is "strategic", whatever that may mean, but the only dif-

[1] This kind of history, background and descriptive information is the subject of judicial notice under F.Ev.Rule 201, by reference to commonly available sources of information whose reliability is not open to question. One reference is the article on BEARINGS, Antifriction, in Vol. 3, Encyclopedia Americana (1957 ed). The volume WHEELS (Life Science Library, 1967) observes at p. 12 that the earliest known record of a vehicular wheel is a sketch made by an accountant (!) in Summer about 3500 B.C. A sketch on p. 14 details a primitive roller bearing made of an oak hub, wooden rollers and axle, found in Denmark along with other parts of a 1st Century B.C. funeral wagon.

ference the court has been able to discern is that an individual who is subpoenaed and who resists the command after a judicial enforcement order is subject to the peril or jeopardy of imprisonment, which the corporation is not. Thus, the use of an individual subpoena is particularly strange in a case like this, where the subpoena is "duces tecum", and the main object is to obtain specified categories of documents, and where the agency has made clear that it will accept the documents by mail along with a verifying affidavit, as compliance with the subpoena without the personal appearance of the witness being required. This practice for non-public investigations is essentially the same as the Grand Jury subpoena for corporate records. Such subpoenas are routinely satisfied through arrangements with the U.S. Attorney to turn over to him the requested documents without any witness appearing before the Grand Jury.[2]

After the subpoena was issued and served, conferences followed. Such conferences are also commonplace and routine. Their object is to arrive at a clearer and sharper definition of the classes of documents called for. It is fairly usual for the subpoena duces tecum to have attached a list of categories of documents on a "boiler plate" format, that either does not match the particular records of the enterprise, or else calls for types of documents of such massive bulk and number as to be essentially useless to the agency and unreasonably burdensome on the supplier.

For most categories, these matters were resolved by negotiations, and as to those the court understands that the documents have been supplied.

The controversy here involves a number of categories of documents which, for lack [593] of a better term, the court has chosen to describe as documents containing "proprietary information". This information includes not only trade secrets, secret processes and secret devices, but also a great mass of management data, evaluations, plans, production and production results of a kind that traditionally and historically is never disclosed outside the company, except on protected and privileged conditions usually established by contract, nor even within the company except to those persons who have a "need to know" the information in order to execute their functions.[3]

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[2] A very good narrative account of the common practices followed in gathering documents by subpoena duces tecum for Grand Jury purposes is found in *Hawthorne* v. *Director of Internal Revenue*, 406 F.Supp. 1098 (D-Pa., 1976). In that report, Judge Edward R. Becker sets out the description (essentially the same as in this District), at pp. 1105-1107.

[3] The property right, of course, is in the information set out by the documents. To retain its quality as property, the information must be kept "secret", as discussed later. Distinguish this characteristic from a copyright or a patent, where the information must be made public in order to obtain the different kind of property interest which resides in them.

For a useful decision distinguishing between pieces of paper and the information written on them, see *Booth* v. *City of New York*, 268 App.Div. 502, 52 N.Y.S.2d 135 (1944). That case involved the professional services of official court reporters and the typed transcripts of proceedings they prepare, in the context of a sales tax law.

In respect to these, an irresolvable impasse was reached. The position of plaintiffs was basically two-fold: one claim was that the request was unreasonable, excessive and beyond authority; the other was that defendants were either unable or unwilling to provide adequate security protection if the data were disclosed, or, if they did, that such arrangements could not be relied on.

The controversy is real, and it is specific. It is plaintiffs' position that this proprietary information is absolutely vital and essential to its ability successfully to compete in the marketplace with all competitors, domestic and foreign, the largest worldwide competitor probably being SKF of Sweden. They assert that this is the kind of information which, in the shrouded world of industrial espionage, is precisely the kind that competitors would give their eye teeth for. If they must give it to FTC for the purposes of the non-public investigation, they will do so with the utmost reluctance and with their "heels dug in". But, even then, they are unwilling to provide it unless effective means are provided to assure that the integrity and safety of the information will be fully protected against disclosure to competitors, either directly or by public dissemination. It is on this aspect that the controversy mainly centers.[4]

Proprietary information, of course, is but one form of intangible personalty, in the same general category as stocks, bonds, mortgages, copyrights, letters patent, and the like. The major characteristic that distinguishes proprietary information from such other forms is that while the disclosure of A's ownership of a particular security in no way affects his ownership thereof or his rights therein, the disclosure of the tenor and content of proprietary information destroys its value as well as the property interest in it. The value resides not in the pieces of paper on which the information is recorded, but in the information itself. Once that information becomes public, the property aspect is gone. [594]

The law in regard to proprietary information, although well known and generally recognized, seems not to have been treated in any comprehensive way, and the decisions reflect indirect aspects depending

[4] If the agency were in a position to "use" the information to engage in the manufacture and sale of NRBs or LNRs in competition, as in a governmental manufacturing arsenal for military equipment, it might be argued that the subpoena would amount to a "taking" for public use, for which just compensation would be required. That is not this case.

Rather, as the court understands the issue, the agency wants to examine the information in its non-public investigation in order to consider whether anti-trust laws have been violated. This does not amount to putting the information to "use". For that purpose, a "taking" is avoided by making certain that the information is not disclosed to competitors or to the public, whether under the FOIA or otherwise, since such disclosure would destroy the property interest and would amount to a "taking" for private use.

Plaintiffs' point, then, amounts to saying that just as they would not agree to disclose the information to a licensee without suitable provisions to assure integrity and safety, they are entitled to equivalent protection before turning it over to the agency. The same would be true of confidential disclosures to an investment banker to support a private loan, or to an interested buyer of the Torrington operation, under conditions to protect and return the proprietary information if the transaction is not consummated.

on the context in which disputes happen to arise. In part, this may be due to the awareness of owners of proprietary information to adopt and follow careful practices to prevent disclosures.

[1] Some decisions arise out of the conduct of a former employee who attempts to use the proprietary information for the benefit of himself and a competitor. Others involve conduct by competitors who manage to obtain the information by unequitable, unfair, or improper means. Decisions of these kinds are generally equity cases where, if the showing for relief be made, the traditional remedy is that of injunction. This is for the obvious reason that money damages are usually incapable of ascertainment, and so the damage is "irreparable" in that form.[5]

A few cases deal with the question whether a secret process is "property" within the meaning of corporation laws requiring that capital stock of a corporation must be paid for in money or "property". See, e.g., *Durand* v. *Brown*, 236 F. 609 (CA-6 1916). For a comprehensive discussion of the same question involving the issuance of stock in exchange for patents, a closely related question, see *Atlas Trailers, etc.* v. *McCallum*, 118 Tex. 173, 12 S.W.2d 957 (1929).

In practical experience, the question arises most frequently, and quite frequently, in the context of the law of evidence. The "trade secret" privilege is well-established at common law and is regularly applied in the federal courts. However, the matter arises at the trial level, as an evidence issue collateral to almost any kind of case, and is routinely dealt with at that level with relatively little recording in the reports.

[2] There can be no real doubt that the trade secret privilege, as a rule of evidence, is grounded on the property nature of the trade secret and that it recognizes the fact that disclosure of the tenor and content destroys both the value and the property. In balancing the

[5] New Jersey has long recognized and given protection to trade secrets, both by way of injunction and damages. *Salomon* v. *Hertz*, 40 N.J.Eq. 400, 2 A. 379 (Ch.1885); *Stone* v. *Grasselli Chem. Co.*, 65 N.J.Eq. 756, 55 A. 736 (E & A 1903) (which is evidently the first ruling by the highest court and which reviews the state of the law throughout the country), *Sun Dial* v. *Rideout*, 16 N.J. 252, 108 A.2d 442 (1954); *Adolph Gottscho, Inc.* v. *Amer. Marking*, 35 N.J.Super. 333, 114 A.2d 19 (Ch.1954), *aff'd*, 18 N.J. 467, 114 A.2d 438 (1955), damage award modified, 26 N.J. 229, 139 A.2d 281 (1958); cover the bulk of the span, with many other cases between.

In general, injunction to restrain employee disclosure is grounded primarily on the property concept; but relief has been given where some trust relation is violated, even though the plaintiff had pirated the trade secret from another, *Vulcan, etc.* v. *American Can*, 67 N.J.Eq. 243, 58 A. 290 (Ch.1894); 70 N.J. 588, 62 A. 881 (Ch.1905), *rev'd*, 72 N.J.Eq. 387, 67 A. 339 (E & A 1906).

Sometimes the issue arises in connection with a covenant not to compete, as in *Whitmyer Bros., Inc.* v. *Doyle*, 58 N.J. 25, 274 A.2d 577 (1971), which recognizes that "the employer has a patently legitimate interest in protecting his trade secrets as well as his confidential business information and he has an equally legitimate interest in protecting his customer relationships."

Another kind of intangible property protected by New Jersey law is categorized as "literary property". A recent example of this protection is found in *Krahmer* v. *Luing*, 127 N.J. Super. 270, 317 A.2d 96 (Ch.1974), in which a contractor made use of house plans for one house, to build another, and was sued by the architect for pirating his work. Construction of the first house was held not to be such a general publication as would justify copying the plans, since the building was the result of the plans, not a copy of them.

need for evidence against the property right, the well-recognized concept is that the privilege is a qualified one in the sense that disclosure will be required (so that the evidence may be available) but under the control of a protective order (to the end that the property not be "taken").[6]

[595] See, for example, F.R.Civ.P. 26(c), for one formulation. The sense of this rule is so well understood, and so regularly applied, that competent counsel have no difficulty, in most cases, in preparing a suitable protective order for entry by consent.

When it adopted the Federal Rules of Evidence by Pub.L. 93—595, 88 Stat.1926, the Congress was wholly unable to come to agreement on any of the proposed privilege rules. In the rules prescribed by the Supreme Court on November 20, 1972, there were specific privilege rules, among which was Rule 508 dealing with trade secrets. The tenor of that rule follows the recognized characteristics without noticeable change. The key sentence said:

> When disclosure is directed, the judge shall take such protective measures as the interests of the holder of the privilege and of the parties and the furtherance of justice may require.

The House and Senate and Conference Committee reports disclose that this rule did not give rise to any problem. Rather, sharply differing views in regard to the inclusions of a newsperson's "shield" law, and the scope of the privileges for "Secret of State" and "Official Information" were not capable of resolution, and instead of adopting any specific privilege rules, the Congress enacted a general rule, Fed.Ev.Rule 501, which calls for application of "the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience".

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[6] Since I—R (the target of the inquiry) is a New Jersey corporation and owns all the stock of Torrington, the situs of this class of intangible personalty is doubtless located here under the usual rule and is governed by New Jersey property law. The only other State whose law might apply is Connecticut where Torrington is based. Connecticut is one of the original states and also a common law state. Its law is usually the same as New Jersey's. Any difference in law has not been briefed or researched. In any event, Mr. Wearly's domicile is irrelevant as he is merely an officer and has no ownership interest in the proprietary information, although he is obliged, as an agent entrusted with it, to see to its protection, and is the witness subpoenaed.

The earliest case discussing the subject in New Jersey appears to be *Salomon* v. *Hertz*, 40 N.J.Eq. 400, 2 A. 379 (Ch.1885). That case was referred to in *Stone* v. *Grasselli Chem. Co.* 65 N.J.Eq. 756, 55 A. 736 (E & A 1903), which was followed in *Taylor, etc.* v. *Nichols*, 73 N.J.Eq. 684, 69 A. 186 (E & A 1908). *Taylor* is mentioned in *Herold* v. *Herold China, etc.*, 257 F. 911 (CA-6, 1919) for the proposition that the practice of making disclosures of trade secrets in camera and under seal "is well established." Of other New Jersey cases, two more worth reading are *Paper, etc.* v. *Newlin*, 101 N.J.Eq. 115, 137 A. 314 (Ch.1927) and *Sun Dial Corp.* v. *Rideout*, 17 N.J. 517, 111 A.2d 881 (1955). *Sun Dial* is especially of interest as it recognizes that while an injunction is ordinarily required to specify what is prohibited, this cannot be done when the restraint is against use or disclosure of trade secrets, for such an injunction would be a public record and would itself destroy the property. Instead, the practice is endorsed of recording the details in a transcript made in camera and held under seal, as the ancient practice evidently was.

More recently, and not in a trade secret context, the New Jersey court has approved and encouraged the use of protective orders as a basis for securing testimonial responses. See *Mahne* v. *Mahne*, 66 N.J. 53, at 62, 328 A.2d 225 (1974); *Gero* v. *Cutter*, 66 N.J. 443, at 446, 332 A.2d 593 (1975) and *Cashen* v. *Spann*, 66 N.J. 541, at 545, 334 A.2d 8 (1975).

For the purposes of the present controversy, the court is satisfied, and finds, that the formulation of proposed Rule 508 adequately reflects the principles of the common law in sense required by Fed.Ev. Rule 501.

The enactment of evidence rules by the Congress was the federal culmination of an effort first reflected by the adoption of the Model Code of Evidence by the American Law Institute in 1942. That formulation was the result of a prolonged study, for which Edmund M. Morgan was Reporter, John M. Maguire was Assistant Reporter, and John H. Wigmore was Chief Consultant. In turn, the Model Code was followed by the Uniform Rules of Evidence drafted by a committee of the National Conference of Commissioners on Uniform Laws, approved in 1953 by the Conference and by the House of Delegates of the American Bar Association, as well as by the American Law Institute the following year.

The Uniform Rules draft formed the basis for a report of May 25, 1955 by a committee of the Supreme Court of New Jersey, headed by Mr. Justice Nathan L. Jacobs, and which included other distinguished members such as the late Mr. Chief [596] Justice Joseph Weintraub, former Mr. Justice Frederick W. Hall, former Superior Court Judge Alfred C. Clapp, and Professor Lewis Tyree. With various modifications, that committee proposed adoption of the Uniform Rules for New Jersey.

For reasons arising under the New Jersey Constitution, 1947 which need not be detailed here, the New Jersey Legislature established a Commission on the subject by JR-15, 1955, headed by the late Superior Court Judge John O. Bigelow. The report of that Commission, dated November, 1956, concluded that the rules be adopted by statute, rather than by the court. In 1960, the issue was resolved by enactment of the Evidence Act, 1960, NJPL 1960, ch. 52. That law enacted the rules on definitions (N.J.S. 2A:84A-1 through 15), a section on Scope of the Rules (N.J.S. 2A:84A-16), and the rules on privilege (N.J.S. 2A:84A-17 to 32). For the balance of the rules, a mechanism was established, modelled on 28 U.S.C. § 2072, for promulgation by the Supreme Court of New Jersey and filing with the Legislature and Governor, who could act by joint resolution. The remaining rules took effect September 11, 1967 as promulgated by the Supreme Court and pursuant to JR-5, 1967.[7]

The significance of this brief history in respect to the present controversy is two-fold. One, the New Jersey Legislature regarded rules of privilege to be so infused with policy considerations wholly in-

[7] While Congress undertook to enact all the federal Rules of Evidence, instead of only the definitions, scope and privilege rules (as New Jersey did), it took the same course as New Jersey by enacting a statutory mechanism through which the Supreme Court may initiate changes in the rules. See 28 U.S.C. § 2076 (1975).

dependent of the judicial process of adducing evidence that it undertook to enact the privilege rules itself. Two, in establishing the scope of the rules, it directed that:

Rule 2(1). The provisions of Article II (Chapter V of the Rules), Privileges, shall apply in all cases and to all proceedings, places and inquiries, whether formal, informal, public or private, as well as to all branches of government and by whomsoever the same may be conducted, and none of said provisions shall be subject to being relaxed. N.J.S. 2A:84A-16.

This scope rule, which derived from the Report of the Bigelow Commission, made the privilege rules applicable everywhere, including any kind of proceeding before administrative agencies. As noted in the Comment to Rule 2 in that Report:

* * * The Rules governing privileges, however, apply in all cases and all proceedings.

The rationale for this view is obvious: if a communication or other kind of information is to be privileged from disclosure for some policy reason unrelated to the taking of evidence, it should be privileged everywhere, not merely in court proceedings. Long established rules of privilege, such as the attorney-client privilege, the marital privilege, or the trade secret privilege, would be meaningless if protected in a lawsuit before a court, but required to be disclosed in a proceeding before a zoning board of adjustment or any other administrative agency.

While the Congress took the same view as did the New Jersey Legislature in respect to the source of authority to adopt rules of evidence, regarding them as substantive rather than procedural (See H.R. 93-650; S.R. 93-1277), its own scope rule, Fed.Ev. Rule 1101, made the enactment applicable to courts but failed to deal with administrative agencies.

Despite this, it is clear that recognized privileges protecting against disclosure must be applied everywhere if they are to have meaning. When a client communicates with his attorney, he cannot possibly forecast the setting in which he or his attorney may be asked to disclose the communication. The purpose of that privilege is to assure the availability of counsel's advice, the soundness of which depends on full disclosure to counsel. Confidence is essential to the relation. The privilege cannot be made to depend on whether the question is asked in court, or by an administrative agency, or by a Congressional committee.

[597] [3] This is even more emphatically true of the trade secret privilege, grounded as it is on the property interest in the content of the information. Here, constitutional considerations are involved.

The sovereign power of eminent domain to take property is inherent in sovereignty. But by Amendment 5 of the Constitution, it may be exercised for public use only upon just compensation. It may not be exercised for private use at all.[8]

[4] Thus, it is plain that any failure to recognize and honor the privilege, and to furnish full and adequate protection against the kind of disclosure that would destroy the property interest in applying the balancing test in instances when restricted disclosure is called for in order to conduct a proceeding, would involve constitutional problems of considerable magnitude. This is for the reason that disclosure is required by act of the government, acting through any of its branches. Amendment 5 applies to all the branches, and all agencies and officers of government.

In some cases, no doubt, the need for the information is lacking in sufficient importance to warrant that the trade secret be disclosed at all. In those cases, the matter involved can be resolved fairly and adequately without disclosure. In other cases, whatever is involved cannot reasonably be resolved without disclosure; in those cases, the requirement to disclose is justified by strictly limiting dissemination of the information. This serves the needs of the proceedings and protects the property interest. It amounts to a disclosure under conditions that are themselves privileged.

The concept is well recognized. A good illustration is found in N.J.Ev.Rule 37 (N.J.S. 2A:84A-29), dealing with waiver of a privilege. The second paragraph reads:

> A disclosure which is itself privileged or otherwise protected by the common law, statutes or rules of court of this State, or by lawful contract, shall not constitute a waiver under this section.[9]

Thus, the owner of a trade secret who discloses it in confidence to his attorney does not waive his trade secret privilege because the disclosure is itself a privileged communication.

So also, the highly confidential data about plant efficiency, production plans, estimates of customer needs, and the like, are commonly disclosed to banks and other financial institutions so that they may pass on loan programs, but only under express or implied obligations not to disclose the information. The owner of a trade secret or secret

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[8] Whether the use for which property is taken is a public use is for courts to determine, *Shoemaker* v. *U.S.*, 147 U.S. 282, 13 S.Ct. 361, 37 L.Ed. 170 (1893); *State by McLean* v. *Lanza*, 48 N.J.Super. 362, 137 A.2d 622 (Law, 1957), *aff'd*, 27 N.J. 516, 143 A.2d 571 (1958), appeal dismissed, 358 U.S. 333, 79 S.Ct. 351, 3 L.Ed.2d 350, rehearing den. 359 U.S. 932, 79 S.Ct. 606, 3 L.Ed.2d 634, *State* v. *Totowa, etc. Co.*, 96 N.J. Super. 115, 232 A.2d 655 (App.1967).

[9] The principle was recognized in the last sentence of Fed.Ev.Rule 511 (not expressly enacted), and the court finds it to be embraced by Fed.Ev.Rule 501. And see, *Gannet* v. *First Nat'l, etc.*, 410 F.Supp. 585, at 589-590 (D-N.J., 1976); rev'd on another issue, sub nom. *U.S.* v. *First Nat'l, etc.*, 540 F.2d 619 (CA-3, 1976), aff'd on another issue, 546 F.2d 1072 (CA-3, 1976).

process may license another to use it, but, if well advised, will require covenants against disclosure.

This characteristic of making disclosure of proprietary information under privileged conditions arising out of contract has been recognized by the Supreme Court. In *Kewanee Oil Co.* v. *Bicron Corp.*, 416 U.S. 470, 94 S.Ct. 1879, 40 L.Ed.2d 315 (1974), the Chief Justice said:

> This necessary element of secrecy is not lost, however, if the holder of the trade secret reveals the trade secret to another 'in confidence, and under an implied obligation not to use or disclose it.' * * * These others may include those of the holder's 'employees to whom it is necessary to confide it, in order to apply it to the uses for which it is intended.' * * Often the recipient of confidential knowledge of the subject of a trade secret is a licensee of its holder. * * * The protection accorded the trade secret holder is [598] against the disclosure or unauthorized use of the trade secret by those to whom the secret has been confided under the express or implied restriction of nondisclosure or nonuse. The law also protects the holder of a trade secret against disclosure or use where the knowledge is gained, not by the owner's volition, but by some 'improper means', Restatement of Torts, § 757(a), which may include theft, wiretapping, or even aerial reconnaisance. A trade secret law, however, does not offer protection against discovery by fair and honest means, such as by independent invention, accidental disclosure, or by so-called reverse engineering, that is by starting with the known product and working backward to divine the process which aided in its development or manufacture. 416 U.S., at 475-476, 94 S.Ct., at 1883 (citations and footnotes omitted).

The court sees no reason why these fundamental principles, which are hornbook law, should not be applied when the disclosure is not voluntary, but is by compulsion of a subpoena issued by any branch of government, and usually enforced by the judiciary.[10]

[5] Failure to provide adequate protection to assure confidentiality, when disclosure is compelled by the government, amounts to an unconstitutional "taking" of property by destroying it, or by exposing it to the risk of destruction by public disclosure or by disclosure to competitors. The constitutional limitation cannot be altered by any branch of government.

The concept of protection for mandatory disclosure of privileged matter finds expression in other laws. Thus, the constitutional right not to be compelled to testify when the testimony may tend to in-

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[10] The point to be kept in mind here is that the subject of the dispute is *property*, not evidence or subpoenas. The latter merely provide the context in which the dispute arises.

Thus, in bank robbery cases where the culprit is caught with the loot, the stolen money, including "bait bills", is seized by the government as contraband (so far as the robber is concerned) and as evidence. Once the trial is completed, and any appeal of a conviction concluded by affirmance, *the money is returned to the bank*. It is not kept by the government or given away.

In a recent unreported case in this district, a defendant charged with 3 bank robberies pleaded guilty to one charge in exchange for an agreement under Rule 11, F.R.Crim.P. to dismiss the other two charges. After sentence, he sued the United States to recover money taken from him on his arrest. To resist the claim the United States only needed to show that the money had been stolen from one of the banks even though the charge as to that bank had been dismissed under the Rule 11 agreement. See, also, *Ruth* v. *First Nat'l Bank etc.*, 410 F.Supp. 1223 (D-N.J.1976) for an even better example of "chutzpa".

criminate the witness, has also been made the subject of a balancing test. Under 18 U.S.C. § 6001, et seq., if the government is of the view that it is more important to have the testimony of a witness than it is to prosecute him for what that testimony may reveal, directly or indirectly, it may decide to give up any right to prosecute on the basis of the testimony or information sought from the witness, and obtain a court order directing the witness to testify notwithstanding the right not to self-incriminate.

Similarly, under the Jencks Act, 18 U.S.C. § 3500, if the government elects not to comply with a court order to provide the defense with a "statement", as there defined, for cross-examination, the court may strike the testimony of the government witness or declare a mistrial. In cases where the testimony is essential to make a case, the government's election not to disclose can result in dismissal of the indictment.[11]

[599] Under the laws governing patents and copyrights, Congress requires disclosure of the invention, or a filing of the copyright material as a consideration for "securing for limited Times to Authors and Inventors the exclusive Right in their respective Writings and Discoveries," U.S.Const., Art. 1, § 8, par. 8.

In all these instances, which are merely illustrations familiar to all, there is a *quid pro quo* of sufficient substance to balance the interests. So, also, compelled disclosures of proprietary information require a balancing *quid pro quo.* Because of the unique nature of the property, which exists only so long as there is only a disclosure that is itself privileged, the only suitable *quid pro quo* is an arrangement, tailored to the particular case, that insures against accidental, or unauthorized, or improper disclosure.

It must be emphasized that, in the context of this case, the issue does not involve the question of deprivation of property "without due process of law", nor the question of taking private property for public use "without just compensation", these being the two explicit provisions of Amendment 5 in respect to property. Rather, the question relates to the "taking" of private property at all, when the taking is not for public use but for private use. This prohibition is implicit rather than express, since it would be an insult to every notion that government may take property for public use only with just compen-

[11] A current example was reported in the Miami Herald of October 25, 1978 (UPI), in connection with the perjury trial in *U.S.* v. *Berrellez* (D-DC). The six felony counts involve allegations of lying under oath to conceal efforts financed by the CIA and ITT to influence Chile's 1970 elections. The U.S. Attorney had asked that the government not be required, during trial, to disclose otherwise relevant evidence that would involve national security secrets. Judge Aubrey Robinson denied the application, with leave to appeal his ruling within 5 days, and it was indicated that if the information could not be withheld, prosecution of the case would have to be dropped, even though Judge Robinson said that he would allow the testimony to be protected by "sealing the courtroom" while the sensitive data was adduced.

sation, and yet be allowed to take private property for private use without any protection or compensation at all.

Nearly a century ago, it was decided that when private property is taken for public use without compensation, the federal courts may take jurisdiction of an action by the owners in ejectment against the agents of government to establish their rightful title, even though there be no statutory remedy, or an imperfect statutory remedy, for obtaining just compensation. See *U.S. v. Lee,* 106 U.S. 196, 220, 1 S.Ct. 240, 27 L.Ed. 171 (1882), which ruled that the heirs of General Lee were the rightful owners of what is now the Arlington National Cemetery, and (more to the point here) that the provisions of Amendment 5 *were intended to be enforced by the judiciary.*

U.S. v. *Lynah,* 188 U.S. 445, 23 S.Ct. 349, 47 L.Ed. 539 (1903), established the rule that the flooding of lands bordering a system of dams and walls across a river was a "taking" of property for which a judicial action and remedy would be provided even though the Congress did not specifically direct that the property be taken, and even though there had been no formal proceedings to condemn the land.

Jacobs v. *U.S.,* 290 U.S. 13, 54 S.Ct. 26, 78 L.Ed. 142 (1933) ruled that even though condemnation proceedings are not instituted, the owner of lands may assert his claim for compensation in his own action. As Chief Justice Hughes observed there:

> That right was guaranteed by the Constitution. The fact that condemnation proceedings were not instituted and that the right was asserted in suits by the owners did not change the essential nature of the claim. *The form of the remedy did not qualify the right. It rested upon the Fifth Amendment. Statutory recognition was not necessary.* Such a promise was implied because of the duty imposed by the amendment. The suits were thus founded upon the Constitution of the United States. (290 U.S. at 16, 54 S.Ct. at 27) (Emphasis added).

The *Lee* case is among the precedents relied on to support the action and the claim made in *Bivens* v. *Six Unknown Agents,* 403 U.S. 388, at 394, 395, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971).

The present case differs only in the respect that since there cannot be any "taking" for private use, and since the "taking" of the kind of property here involved, without authority in law, is "irreparable" in the sense of money damages, the remedy sought is different. The remedy sought is a declaration that the threatened "taking" is [600] wrongful, and if that point be established, to prevent the unlawful taking.[12]

It is well known that this kind of question is not dealt with in the precedents, because traditionally the trade secret privilege has been recognized and honored, not only in the courts but also in the other

[12] Proprietary information, in the trade secret category, is not unlike the status of virginity. Once taken without consent, whether by seduction or rape, it is gone forever.

two branches of government. It is only since the enactment of the Freedom of Information Act, 5 U.S.C. § 552, as amended, that the problem has arisen. Through that law, anyone may ask for copies of documents which are among the records of the countless agencies in the Executive Branch, by merely paying the rate for making copies and without any showing of standing, legitimate interest or any other threshold requirement. Documents (that is, the information they contain) furnished under that law are automatically in the public domain, and to the extent that what is furnished amounts to proprietary information, the supplying of it obviously amounts to a "taking" by destruction of the privilege, and the taking is for the use of the private requester, thus making the process one of taking private property for private use. This is the root of the threat and of the risk in this case, for if the proprietary information be turned over to defendants without appropriate protection and assurance of protection *in advance*, the risk of loss by improper taking is necessarily a considerable risk.[13]

In their note to proposed Fed.Ev.Rule 508, the distinguished Advisory Committee observed:

> While sometimes said not to be a true privilege, a qualified right to protection against disclosure of trade secrets has found ample recognition, and, indeed, a denial of it would be difficult to defend. * * * Congressional policy is reflected in the Securities Exchange Act of 1934 * * * and the Public Utility Holding Company of 1933 * * *, which deny the Security and Exchange Commission authority to require disclosure of trade secrets and processes in applications and reports.

Despite the express provision in the Federal Trade Commission Act, 15 U.S.C. § 46(f), denying the Commission the authority to make public "trade secrets and names of customers", and despite the provision in the Freedom of Information Act, 5 U.S.C. § 552(b)(3) and (b)(4), that

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[13] The legislative and public history of the FOIA discloses that the primary consideration for its enactment was to allow public access to internal government workings. The concern was mainly for "Big Brother" risks, as well as for undisclosed, inconsistent treatment of like matters on an *ad hoc* basis rather than by the rule of law. Invasions of privacy, a very broad concept that includes the accumulation in previously inaccessible government files of "raw data", whether reliable or not, was another facet of that concern. In the process, the Act also reached proprietary information possessed by government by compulsion (or voluntarily on recognition of the compulsory power) incidental to the performance of some governmental function. This kind of information was excluded by the black letter of the statutory provisions that the "section" does not apply to specified categories of data, but a surprising number of courts have managed to read this language as discretionary rather than mandatory.

When the information is in the possession of an agency in the Executive Branch, and is requested on behalf of the Congress from the agency, the risk is considerably increased. Aside from the occasional and well-known instances of improper "leaks", the classic example of the risk involved is that of the late Senator Joseph McCarthy, whose practice it was to make public disclosures under protection of the "speech and debate" clause, *U.S. Const.*, Art. 1, § 6, cl. 1.

While no improper motive is attributed to the Congress as an institutional body, any group that large has a reasonable likelihood of containing one or two members with ulterior motives, and the problem of a Senator McCarthy has not been solved. It takes only one member of Congress, using the speech and debate clause, to destroy proprietary information without known remedy to the victim. The *Tobin* and *A T & T* cases mentioned later, show this to be reality.

(b) This section [act] does not apply to matters that are—

. . . . .

[3] specifically exempted from disclosure by statute;
[601] (4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

there is still a live, active and sharply contested controversy here. One reason, among others, is that 5 U.S.C. § 552(c) says that: "This section is not authority to withhold information from Congress."

At least since *Tobin* v. *U.S.*, 113 U.S.App.D.C. 110, 306 F.2d 270 (1961), *cert. den.* 371 U.S. 902, 83 S.Ct. 206, 9 L.Ed.2d 165 (1962), and through *U.S.* v. *Fort*, 143 U.S.App.D.C. 255, at 262-263, 443 F.2d 670, at 677-678 (1970), *cert. den.* 403 U.S. 932, 91 S.Ct. 2255, 29 L.Ed.2d 710 (1971), the courts have been urging the Congress to deal with the problem of claims of privilege, particularly in the extremely delicate setting of a Congressional subpoena. The problem is highlighted by *U.S.* v. *A.T. & T.*, 179 U.S.App.D.C. 198, 551 F.2d 384 (1976), in which the Department of Justice (in the Executive Branch) sought relief from the courts to prevent disclosure by a witness (AT&T) of information involving national security wiretaps under a subpoena by a subcommittee of the House of Representatives. The opinion is highly educational.[14]

Congress is not unaware of the problem. In Senate Report No. 95-170, to accompany S. 555 (95th Congress, 1st Session) the need for some rational resolution of this aspect of the problem is recognized, especially at pp. 16-21. At this writing, whether any action was taken before the *sine die* adjournment of October 14-15, 1978 is not yet known.

There are other specific statutes involving regulatory agencies, enacted *after* the Freedom of Information Act, in which the Congress has explicitly stated that proprietary information is not to be disclosed, yet these, too, are the subject of litigation in District Courts throughout the country, one of them now pending here, in which the ruling has been delayed so that the court may consider the effect, or the applicability, of amendments enacted within the last month.[15]

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[14] Earlier this year, the press reported that Secretary Califano of H.E.W. was subpoenaed by a Congressional committee to answer questions which the law forbids him to answer. If he declines to answer, he may be prosecuted under the same law involved in *Tobin*. If he answers, he violates the law which forbids the answer. The authorized penalty under each law is the same. Because the Congress has adjourned *sine die*, the question and his peril may be moot, at least until the next Congress convenes.

[15] Under existing New Jersey law, N.J.S. 2A:119-5.1 to 5.5, the theft, embezzlement or copying of "trade secret" information is a criminal offense. These provisions have been embodied in the new Penal Code, N.J.S.2C:20-1, *et seq.*

There are other statutory enactments which quite effectively express the balance between the need of an agency to have access to proprietary information, and the need of the owner to have that information protected against destruction by general disclosure.

[602] Although this court does not claim to have searched all the statutes comprehensively, it is informed that there are at least 80 statutory sections, from Title 2 U.S.C. to Title 49 U.S.C., which employ the term "trade secrets". There are said to be more than 20 decisions of the Supreme Court of the United States, alone, in the period from 1944 to 1977 that deal with the term in some fashion. This is a massive literature in primary authority which reflects the wide recognition of the term and the concept it represents.

With the foregoing as an analytical context, it is possible to turn to specific issues in this case. There is no need to repeat here the jurisdictional basis set out at the time the court ruled on the application for preliminary injunction. The determination there made is fortified by the decisions in *Lee, Jacobs* and *Bivens,* mentioned above.

(Footnote Continued)

One statute, N.J.S. 26:2C-9(d), dealing with inspections to locate sources of air pollution, provides that:

"Any information relating to secret processes or methods of manufacture or production obtained in the course of such inspection, investigation or determination, shall be kept confidential and shall not be admissible in evidence in any court *or in any other proceeding* except before the department . ." (Emphasis added).

Another statute, the Mid-Atlantic States Air Pollution Control Compact, N.J.S. 32:29-1, et seq., uses the following language in section 24:

"Any records or other information furnished to or obtained by the commission . . . which records or information, as certified by the owner or operator, relate to production or sales figures, or to secret processes or production, or which if made known to others would tend to affect adversely the competitive position of such owner or operator, shall be retained solely for the use of the commission and its employees, . . . and shall not be published or disclosed for any other purpose by any officer or employee of the commission or any other person without the written consent of such owner or operator."

Still another statute, assigning power to the Interstate Sanitation Commission in respect to air pollution, provides, in N.J.S. 32:19A-5, that:

"No trade secret or secret process shall be inquired into by the Interstate Sanitation Commission under this act, whether with respect to 1 or more of the substances or 1 or more of the processes, operations, techniques or devices used in connection therewith, and whenever a trade secret or secret process is involved, the activity under this act shall be limited to the identification of the device or facility from which the effluent discharged into the outer air derives, and the nature, rate and period of emission of such effluent.

"All information obtained from any sampling, tracing or other specific inquiry performed under this act shall be kept and maintained as a confidential disclosure and, except as may be essential for the purpose of referring a complaint to an appropriate enforcement agency and of any enforcement proceeding by or before any such agency, shall not be disclosed or published in any way other than such as will not identify a given substance, process, operation, technique or device with the physical location or identity of the source plant or facility, or with the product made or service performed, or with the person or persons using the same. "A printed copy of the provisions of this section shall be furnished on request to any person furnishing information to the Interstate Sanitation Commission and, in case of an inquiry at a plant or facility, to the person then in charge of the same."

This legislative treatment of the subject reflects an obvious recognition of well established common law and constitutional principles brought into play in circumstances involving proprietary information. Through one formulation or another, they strike a balance between agency needs for access to such information to carry out a regulatory function without invading the property interest. It is of some significance that there is no reported court decision on these statutes. The absence of such litigation speaks well both for the expression of the balance struck and for the honoring of the policies reflected in the statutes without agency attempts to evade or avoid.

[6] That declaratory judgment relief is proper can hardly be disputed. The existence of a genuine controversy between specific parties, over issues that mainly involve questions of law going to their respective rights, duties and legal relations, and depending on the construction of Constitution and statutes, is clear.[16]

It is also clear beyond argument that defendants lack even a rule or regulation governing the subject at the non-public investigation stage, and that the proposed regulation, 43 Fed.Reg. 3571 (January 26, 1978) is woefully inadequate for the protection of private property.

[7] It will not do to say that the agency, under ordinary principles, should first have the proprietary information submitted pursuant to its subpoena, and that it will entertain a request for a letter for confidential treatment. This will not do for several reasons. One is that the owner of proprietary information should never make a disclosure of its content, either voluntary or involuntary, without enforceable restrictions against general disclosure, by contract or court order first obtained. Another is [603] that allowing the agency to rule first furnishes an inadequate procedure, because the standards for review are extremely limited, and an owner of proprietary information runs the risk of loss of his property on procedural and technical grounds. It is the courts, not the administrative agencies in the Executive branch which are charged with seeing that the Constitution is honored; it is the courts, not the administrative agencies, that decide whether a "taking", even when authorized by statute, is in fact taken for a public use. See, *Shoemaker* v. *U.S.*, 147 U.S. 298, 13 S.Ct. 361 (1893).

No doubt the courts at one time were reluctant to accept the notion of a declaratory judgment as constituting a judicial act. This reluctance was one of semantics, as Professor Bouchard observed long ago, because courts of law and equity have both engaged in making declarations of rights, duties, status and legal relations for centuries. The action in trespass with a feigned issue is nothing more than a declaratory judgment to try title. Resolutions of conflicting claims

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[16] FTC has argued that there is no "imminent" threat of any disclosure to competitors or to the public, of any of the proprietary information, and thus that the suit is premature. The point is related to whether injunction is warranted, but not to interlocutory judgment relief. In *Ortiz* v. *Engelbrecht*, 474 F.2d 977 (CA-3, 1973), the court reversed dismissal of a suit brought to challenge the "tacking" provision for service of process in dispossess actions. Judge Garth had dismissed because the landlord had decided to abandon the dispossess suit, and thus there was no basis for injunction. As the later proceeding show, 61 F.R.D. 381, at 395 (D-N.J., 1973), jurisdiction existed for processing to declaratory judgment.

Some reported opinions do reflect the view that where injunction is not warranted, then declaratory relief must also be denied. Such expressions may be instances of an exercise of discretion to withhold the relief if it be felt that a declaration would not resolve the controversy. They cannot be taken to hold contrary to what was enacted by the Congress in the Declaratory Judgment Act, 28 U.S.C. §§ 2201, 2202, which authorizes a court to "declare the rights and other legal relations of any interested party seeking such declaration, *whether or not further relief is or could be sought*" (Emphasis added).

between heirs and devisees, long known, are nothing more than declaratory judgments construing wills and statutes. Deliberate violations of municipal ordinances or statutes to invite charges defended by a challenge to the validity of the ordinance or the statute, are inherently proceedings whose object it is to obtain a declaration on the question of validity. A simple scanning of the table of contents in Bouchard's classic text will display countless other examples.[17]

The only difference between those well established actions and the declaratory judgment action lies in the mere form of the action, and in the fact that in most cases a declaration is all the remedy that is needed. Once adjudicated, the dispute is resolved and the parties traditionally honor the adjudication. Further remedies, as by way of execution or enforcement of the adjudication, or by injunction "at the foot of the decree", is rarely needed, but can be provided in the same cause if necessary.

A modern recognition of the declaratory judgment action, perhaps the most civilized form of litigation of disputes yet devised, is found in *Super Tire etc.*, v. *McCorkle*, 416 U.S. 115, 94 S.Ct. 1694, 40 L.Ed.2d 1 (1974), from this circuit, in which the Supreme Court sustained jurisdiction even against a claim of mootness, on the ground that the controversy was real, genuine and continuing, and the case was one capable of repetition, yet evading review.

The declaratory judgment is an especially valuable tool in a case like this one. Not only will the determination (whatever it may be) resolve the existing controversy between the parties, but to the extent that its outcome is sound it provides precedent to be considered in the resolution of countless other controversies involving essentially the same underlying question all over the country. Even though this case be massive and difficult, its correct determination promises far more in judicial economy than the many emergency cases that would need to be filed with requests for temporary restraining orders after receiving a 10-day notice of intent to disclose proprietary information, which defendants propose.

The controversy is real and genuine. It involves a peculiar form of property than can vanish by evanescence, sublimation or osmosis. It is in that class of personalty, like the heirloom, the original manuscript of "Look Homeward Angel", the Mona Lisa, the Venus de Milo, and other like items for which equity historically has provided the suitable remedy of specific reparation. By resolving the controversy now, through the declaratory judgment, the need for the extraordinary remedy of specific reparation can be avoided, as can the

[17] Particularly applicable is the discussion in *Bouchard*, "Declaratory Judgments" (2nd Ed) under the leads "Titles to Personal Property" (pp. 753-758); "Administrative Powers and Disabilities" (pp. 875-900); and "Relief for Peril and Insecurity" (pp. 927-1019).

incalculable risk that even that remedy would be hollow if the *res* had meanwhile "gone public".

The court does not see this case as one of "judicial review" of some administrative action. Nor is this a case of conducting a hearing "de novo" after some administra[604]tive hearing and determination. Rather, this is a case invoking the original jurisdiction of the court, as a court of first impression. It is a plenary action to resolve a clear-cut controversy. Plaintiffs assert their claims of rights, duties and legal relations, and defendants contest them. There is nothing in the law to suggest that a governmental official, or a government agency, cannot be a party to a controversy within the scope of a declaratory judgment action. The books in jurisdictions throughout the nation, state and federal, have many precedents of this nature in which the controversy is between private parties on the one hand and government on the other.

[8] On the record before this court, it has been clearly established that the disputed documents contain proprietary information, that defendants have no right to make any of it public or to provide it to a requester under the Freedom of Information Act or any other act, and that plaintiffs are entitled to a declaratory judgment to resolve the controversy. The court so finds on both the facts and the law.

Ordinarily, this is as far as a court would need to go. Ordinarily, a court would refrain from granting other or further relief beyond the declaratory judgment. This is especially so in a case involving officials and agencies of government because the court expects that the declaration will be honored and adhered to so long as it remains in force.

With due regard for recognition of the principles of comity between the several branches, and with considerable reluctance, the court concludes and finds that its judgment in this case must provide a suitable remedy beyond the declaration itself.

The reason for this conclusion and finding is that in the course of the case, the defendants chose with awareness and deliberation to decline to submit some 152 documents sought for discovery, for *in camera* inspection so that the court could rule on various claims of privilege raised by them. The court's orders in this regard were drafted with great care, to assure defendants the same protection as is claimed by plaintiffs for their privileged information.

The mechanism chosen called for delivery of all the documents to the U.S. Attorney, who is the attorney of record for defendants under the General Rules of this District. A list of the documents was to be furnished to the court under seal, along with a designation of a few items in each claim of privilege to be inspected *in camera* under seal. Defendants were assured that no ruling adverse to any claim of privilege on any document would be made without first conducting

an evidentiary hearing from which plaintiffs and their counsel would be excluded.

To the extent that defendants asserted that some documents contained proprietary information owned by persons not party to the action, the order directed that those persons be given notice so that they might appear and be heard on the question.

The court's orders in this regard were not honored. It is satisfied that this disregard of orders was not out of disrespect for the court, but rather to preserve some unknown and unidentified legal issue never presented. The cases are essentially uniform and clear that all the privileges claimed by defendants, like the privilege claimed by plaintiffs, are qualified privileges for which *in camera* inspection, hearings under seal, necessary deletions of sensitive matter, and the like, are part of the regular business of the trial courts.

The posture taken on these orders is both distressing and dismaying, because the clear inference is that a declaratory judgment, without more, will similarly be disregarded.

The process of balancing interests when dealing with privileged information subject to qualifications is quite simple. Given a colorable showing that the information is proprietary, recognition of the property right takes the form of ready (and not stingy) award of suitable protection against improper disclosure. The greater the degree of protection, the more generous a court can be in ordering disclosure. But when the indications are as strong as they are here that orders of the court will not be [605] honored, there can be no confidence that its declaratory judgment, by itself, will be honored.

What form that kind of additional relief ought to take is reserved until such time as the court has heard both sides on the issue. In the meantime, the protective order originally entered herein and as later particularized and refined, will remain in full force and effect. This will assure that the subject of the controversy will remain in the jurisdiction of this court pending resolution of the question now posed. This is seen as unavoidably necessary, for the time being, even though under other circumstances the court's inclination would be to supplement the declaratory judgment with a protective order to preserve the subject matter, and otherwise allowing delivery of the documents to defendants in Washington on suitable terms. The recalcitrance of defendants precludes that usual approach in this case and at this time.

The heart of the controversy having been disposed of above, it remains to treat a number of collateral issues.

[9] The source of the claim is said to arise under Amendments 4 and 5 of the U.S. Constitution, under the FTCA, 15 U.S.C. § 41 et seq., under the Administrative Procedure Act, 5 U.S.C. § 551, et seq., 18 U.S.C. § 1905, The Declaratory Judgments Act, 28 U.S.C. §§ 2201,

2202; the Census Act, 13 U.S.C. § 9, and the Federal Reports Act, 44 U.S.C. § 3501, et seq.

In view of the analysis of the controversy, it is clear that the claim arises under federal law, the primary sources being Amendment 5 of the U.S. Constitution, the FTCA, and the Declaratory Judgment Act. The other references, to the extent pertinent, are corroborative of these major sources whether they provide independent grounds or not.

Jurisdiction is claimed under 28 U.S.C. §§ 1331, 1337, 1361, and 2201 and 2202. The last two sections authorize the declaratory judgment remedy but are not jurisdictional grants in themselves. Jurisdiction is also claimed under 5 U.S.C. §§ 701-706, but in view of the footing based on the Constitution, in the light of the *Lee, Lynah, Jacobs* and *Bivens* cases, and because of the restricted nature of the Administrative Procedure Act in comparison with the full, plenary nature of the action on constitutional aspects, these sources add nothing to the jurisdictional question.

[10] Venue was also challenged. The court sees no arguable issue in this regard. The non-public investigation was aimed at I-R which is here in New Jersey. As the parent company owning all the stock of its wholly owned subsidiary, Torrington, I-R is the "real party in interest." Since venue is clearly proper as to I-R, there is no reason why proper parties like Mr. Wearly (to whom the subpoena was addressed) and Torrington (which manufactures the NRB's and LNR's) cannot join as plaintiffs in the same action. Had I-R brought suit alone, both could have applied to intervene because of their related interests, which are inextricably intertwined.

While this is probably not a "local" rather than "transitory" action, the fact is that property rights and property interests, in the context of a "taking" by government, are traditionally defined by state law rather than federal law. See, for example, the Annotation at 1 ALR Fed. 479. Local law in the District of Columbia could not possibly have any application.

[11] Next is the question whether FTC's summary proceeding for a court order to enforce the subpoena was a "mandatory counterclaim" under F.R.Civ.P. 13(a). The court is satisfied that it was. The language and the sense of the rule are clear: it requires, in mandatory form, that a pleading "*shall* state as a counterclaim *any claim which at the time of serving the pleading* the pleader has * * *" (Emphasis added). The term "claim" is extremely broad and more than adequate to embrace FTC's claim for a subpoena enforcement order.

FTC protests, however, that under section 9 of the FTCA, such proceedings can only be brought in the district where the agency inquiry is being carried on, namely [606] in Washington, D.C., and it so persuaded the learned District Judge there on the application of

Mr. Wearly and I-R to transfer venue of the subpoena enforcement proceeding to this district (see Transcript of Hearing, Exh. D-1-C, vol. III, pp. 820-821). With due regard to the view of that trial court, the question there presented was different. The question there was one involving a transfer of venue. The question here, where the plenary action was already pending involves the applicability of the mandatory counterclaim rule. Only this court could effectively rule on the point, since a mandatory counterclaim could only have been filed here, not in the District of Columbia. The court is satisfied, and finds, that the summary enforcement claim is a claim coming within F.R.Civ.P. 13(a), and that it should have been stated as a counterclaim along with the answer in this case.

The mandatory counterclaim requirement is the closest that federal courts have come to the achievement of the laudable "single controversy" doctrine, under which all parties to a pending action in one court must assert in the same proceeding any and all related and connected claims.

Nor is the "venue" argument persuasive, in terms of where the "inquiry" was being conducted. The principle is well-established that when the mandatory counterclaim rule applies, venue requirements that would otherwise control have no application. No other treatment could possibly achieve the worthy purposes of the mandatory counterclaim requirement.[18]

There is neither time nor space here to detail the independent steps taken by FTC, well after this action was underway, to initiate summary subpoena enforcement proceedings in the District of Columbia, although the full record there has been carefully reviewed. Suffice it to say that their culmination in an enforcement order is not res judicata of the issues here. In such proceedings, the party haled into court cannot assert, as a matter of right, claims and issues like those asserted here, and insist on having a decision on the merits. Nothing decided in the District of Columbia reached or decided the issues involved here. At best, they were regarded as premature, presumably to be considered after the claim of privilege had been asserted before FTC, in connection with a proceeding for contempt or a criminal prosecution. For the reasons discussed above, the questions cannot be premature because proprietary information should never be disclosed unless the privileged conditions or protective order are first established.

[18] Venue is controlled by where the case is "brought"; since a suit was brought here by plaintiffs, the venue requirements do not apply to the compulsory counterclaim. See *Lesnik* v. *Public etc.*, 144 F.2d 968 (CA-2, 1944); *G & M Tire* v. *Dunlop, etc.*, 36 F.R.D. 440 (Miss., 1964).

Nor is any independent jurisdictional ground needed for a compulsory counterclaim, *Moore* v. *N.Y. Cotton Exchange*, 270 U.S. 593, 46 S.Ct. 367, 70 L.Ed. 750 (1926); *Scott* v. *Fancher*, 369 F.2d 842 (CA-5, 1966).

For an excellent discussion of the "single controversy" doctrine as such, see *Bennun* v. *Board of Governors, etc.*, 413 F.Supp. 1274 (D-N.J., 1976).

[12, 13] If anything is clear about the law of res judicata, it is that the court in which that claim is advanced is the only court authorized to decide the issue. That court is this court. The record is clear that the summary proceedings in the District of Columbia, although culminating in an enforcement order earlier in time than this ruling, neither took up nor decided the issues decided here. Absent an earlier *decision*, the defense of res judicata has no application.

Finally, there is the matter of sanctions sought by plaintiffs against defendants for their outright refusal, although respectful, to comply with the discovery orders here. The court believes that this point should be reserved for further deliberation and further hearing after the parties have recovered from the "heat of battle". Without sanctions, the evidential record is extremely strong. The testimony of plaintiffs' witnesses fully supported their claims, and were in no way depreciated by cross-examination. The samples of the disputed documents which the court inspected *in camera* [607] fully corroborated that testimony. Under this court's discovery order, granted at defendants' request, all of the documents were gathered in New Jersey, put under strict controls to assure integrity and reliability, and made available to defendants not only for the purposes of this case, but also so that they could proceed with the non-public investigation at the same time. Defendants chose deliberately not to inspect the mass of documents so made available. The court can only infer and conclude that they are well aware that even with such inspection and further testimony, they could not successfully controvert the showing made that these sensitive documents contain proprietary information entitled to an effective protective order.

The record also contains examples of a number of instances where informal arrangements for confidential treatment of proprietary information were not strictly honored. One in particular, where proprietary information was made public without notice to the provider, and despite a supposed protective order by an administrative judge, is enough proof of the reality of the threat and risk in and of itself. Defendants argued that the disclosure did not violate the literal terms of the order, but it strains credulity to argue that this position is other than hypertechnical and that both the FTC staff and the administrative judge must have been fully aware that the disclosure was an evasion, and a violation of the spirit of the order. This kind of behavior by government simply cannot be countenanced.

So far as the 152 documents are concerned, the fact that claims of privilege were raised allows no adverse inferences to be drawn. However, the unexplained refusal of defendants to submit these documents for *in camera* inspection and for hearings under seal

without the presence of any representative of plaintiffs does warrant the inference that, if the privilege claims were found to be unwarranted or subject to a balancing test, the facts disclosed thereby would have been adverse to defendants.

As noted above, the decision here is reached without the benefit of these inferences. The utter inadequacy of a suitable system of full protection against disclosure, established *before* any proprietary information is turned over, is sufficient to support the judgment.

Also, although some courts have regarded criminal statutes such as 18 U.S.C. § 1905 as providing adequate protection, this court cannot agree. This kind of statute is at best precatory and unenforceable as of right by the aggrieved person. The most the owner of proprietary information can do, if his property is destroyed by improper disclosure by a government employee, is to file a complaint charging violation of the criminal statute. Given the vast number of government employees, and the plethora of copy machines, the complaint would doubtless have to be against "John Doe". From that point on the vindication of his claim through the criminal justice system would be dependent entirely on the efficacy of the investigative process and prosecutorial discretion whether or not to press the charge. And a "reasonable doubt," by itself, would be enough to bar conviction. Even if the culprit were found, charged, tried, convicted and sentenced, this would be no remedy at all for the loss of property through improper disclosure. The damage would have been done, and would be irreparable. Nothing short of enforceable means established in advance of compulsory disclosure will serve.

After review of this ruling, the parties are directed to appear before the court on November 3, 1978, at 10 AM, so that they may present their views in regard to the tenor and phrasing of a final judgment in accordance herewith.

EXXON CORPORATION *v.* FEDERAL TRADE COMMISSION et al.*

KERR-McGEE CORPORATION *v.* FEDERAL TRADE COMMISSION et al.*

UNION CARBIDE CORPORATION *v.* FEDERAL TRADE COMMISSION et al.*

Nos. 77-1302 to 77-1304. F.T.C. File No. 99-357

(United States Court of Appeals, District of Columbia Circuit, October 19, 1978)

1. SINCE CONFIDENTIAL DATA WAS WITHIN SCOPE OF SUBCOMMITTEE'S INVESTIGATIVE AUTHORITY, AND ITS RELEASE PURSUANT TO A CONGRESSIONAL REQUEST DID NOT CONSTITUTE PUBLIC DISCLOSURE, OR IMPAIR THE VALUE OF THE INFORMATION, PERMANENT INJUNCTION REQUIRING TEN-DAY NOTICE TO AFFECTED PARTIES WAS NOT AVAILABLE.

   Permanent injunction requiring ten days' warning to affected parties before Federal Trade Commission could disclose "trade secrets" pursuant to congressional request was not available where material which FTC proposed to divulge, information relating to ownership, operation of, and future expectations for uranium holdings, were fully within scope of legitimate investigatory powers of Senate Judiciary Subcommittee on Antitrust and Monopoly, and release of information to Congress did not constitute public disclosure and, hence, did not in itself impair value of "trade secrets" involved.

2. WITHOUT A PRIOR AGREEMENT TO DO SO, FTC NEED NOT PROVIDE AFFECTED PARTIES WITH PRIVATE NOTICE BEFORE RELEASING PROPERLY REQUESTED DATA TO CONGRESS, ABSENT A CLEAR SHOWING OF CONGRESSIONAL INTENT TO MAKE INFORMATION PUBLIC.

   Absent a showing that it is evident that Congress intends to make "trade secrets" divulged to it by Federal Trade Commission publicly available, the Commission may, upon proper demand, release "trade secrets" to the Congress without the necessity of private notice to the parties involved unless the Commission has obtained such information upon an agreement to give prior notice to the parties.

3. COURTS, IN THE ABSENCE OF A CLEAR VIOLATION OF CONSTITUTIONAL RIGHTS, CANNOT COMPEL FTC TO WITHHOLD PROPERLY REQUESTED "TRADE SECRETS" PENDING CONGRESSIONAL ASSURANCES THAT DATA WILL NOT BE PUBLICLY DISCLOSED WITHOUT A MAJORITY VOTE BY MEMBERS OF REQUESTING COMMITTEES OR SUBCOMMITTEES.

   In absence of a concrete violation of law, rule or regulation, Federal Trade Commission cannot be compelled by a court, prior to divulging "trade secrets" to Congress on proper demand, to obtain assurances that confidential information will not be publicly disclosed unless a majority of members of congressional committee or subcommittee vote to do so.

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* Reported in 589 F.2d 582 (1978); *rehearing denied* Dec. 6, 1978; As Amended Dec. 19, 1978.

4. JUDICIAL INTERFERENCE INTO INTERNAL CONGRESSIONAL PROCEDURES IS WARRANTED ONLY IF CONSTITUTIONAL RIGHTS ARE VIOLATED.

Although courts will intervene to protect constitutional rights from infringement by Congress, including its committees and members, where constitutional rights are not violated, there is no warrant for judiciary to interfere with internal procedures of Congress.

5. IN ACCORDANCE WITH LONG-STANDING PRINCIPLE OF JUDICIAL ABSTENTION INTO ACTIONS OF LEGISLATURE, COURTS MUST DISMISS APPLICATIONS SEEKING TO RESTRICT CONGRESSIONAL COMMITTEES' USE OF INFORMATION, WHEN NOT SUBSTANTIATED BY SHOWING OF IMMEDIATE THREAT TO CONSTITUTIONAL RIGHTS.

Strong and long-standing principle of judicial abstention into actions of legislature demands that courts avoid possibility of unwarranted interference with a coordinate branch of government by requiring dismissal of applications seeking to restrain congressional committees' use of information not substantiated by a showing of need arising out of immediate threats to constitutional rights.

6. SINCE IMPOSITION OF A PARTICULAR VOTING REQUIREMENT TO OPERATE IN THE MANNER OF A CONGRESSIONAL RULE WOULD CREATE NEEDLESS FRICTION WITH A COORDINATE BRANCH OF GOVERNMENT, COURTS SHOULD REFRAIN FROM SUCH ACTION.

Courts should refrain from creating needless friction with a coordinate branch of government by imposing a particular voting requirement to operate in manner of a congressional rule on grounds that such a safeguard is necessary to ensure the Congress will act responsibly with "trade secrets" entrusted to it.

7. FTC AND COURTS MUST ASSUME THAT CONFIDENTIAL DATA SUBMITTED TO CONGRESS WILL BE TREATED RESPONSIBLY.

Federal Trade Commission and courts are compelled to rely on assumption that congressional committees will act responsibly with confidential data revealed to them.

8. DESPITE ALLEGATIONS OF CONGRESSIONAL LEAKS OF "TRADE SECRETS," COURTS CANNOT OVERSEE ACTIVITIES OF LEGISLATURE, ABSENT A CONCRETE VIOLATION OF LAW, RULE OR REGULATION; AFFECTED PARTIES HAVE RECOURSE AGAINST OFFENDING INDIVIDUAL DIRECTLY, AND THAT POSSIBILITY MAY DETER SUCH "LEAKS."

If a member of Congress or congressional staff member improperly leaks "trade secrets," injured parties have a recourse against individual directly, and possibility of such action will serve to deter unjustified disclosure of "trade secrets," but beyond provision for such suits, and in absence of a concrete violation of a law, rule or regulation, courts are unable to aid in a request to oversee activities of legislature, allegations of prevalence of leaks notwithstanding.

9. ALTHOUGH FTC SHOULD NOT DISCLOSE "TRADE SECRETS" TO CONGRESS SUA SPONTE, COMMISSION'S RIGHT TO DISCUSS THE GENERAL NATURE OF RELEVANT INFORMATION WITH MEMBERS OF CONGRESS OR THEIR STAFF, PRIOR TO CONGRESSIONAL DEMAND, CANNOT BE RESTRICTED, SINCE LEGISLATURE IS OFTEN UNAWARE OF DATA'S AVAILABILITY OR RELEVANCY TO AN INVESTIGATION.

Federal Trade Commission should not simply disclose "trade secrets" to Congress sua sponte, but since the Commission will invariably know the nature of the information in its possession far more accurately than Congress, and oftentimes may be aware of data clearly pertinent to an investigation of which Congress has no knowledge or intimation, the Commission cannot be restricted in its right, prior to congressional demand, to discuss with members of Congress or their staff the general nature of available data and thus use its expertise to inform the legislature of relevant information of which the Congress may often be unaware.

10. ABSENT A PROPER REQUEST OR SUBPOENA, FTC MAY NOT DISCLOSE STATUTORILY PROTECTED "TRADE SECRETS" TO CONGRESS.

[584] Federal Trade Commission may not reveal statutorily protected "trade secrets" to Congress unless it has received a proper request or subpoena for same.

11. CONGRESSIONAL COMMITTEES AND SUBCOMMITTEES, IN EXERCISING THEIR SUBPOENA POWER, MUST CONFORM STRICTLY TO THE RESOLUTION ESTABLISHING THEIR INVESTIGATORY POWER, AND THEIR SUBPOENAS MAY ONLY BE SIGNED BY THOSE EXPRESSLY AUTHORIZED TO DO SO.

Subpoena power may be exercised on behalf of Congress by either House and, while subpoenas issued by committees have the same authority as if they were issued by the entire House of Congress from which the committee is drawn, to issue a valid subpoena, a committee or subcommittee must conform strictly to the resolution establishing its investigatory power, and only those parties expressly authorized to sign subpoenas may do so validly.

12. INDIVIDUAL CONGRESSMEN CANNOT COMPEL DISCLOSURE OF INFORMATION; SUCH AUTHORITY RESTS WITH CONGRESS, ITS COMMITTEES AND SUBCOMMITTEES, AND MAY ONLY BE EXERCISED FOR INVESTIGATIONS AND CONGRESSIONAL ACTIVITIES.

Disclosure of information can only be compelled by authority of Congress, its committees or subcommittees, not solely by individual members, and only for investigations and congressional activities.

13. AN INDIVIDUAL DOES NOT ATTAIN POWER TO SUBPOENA INFORMATION OF PERSONAL INTEREST BY ELECTION TO CONGRESS.

Election to Congress does not give an individual subpoena power over whatever information he may happen to be interested in, and particularly not over "trade secrets," whose oftentimes enormous value may be forfeited by disclosure to public.

14. DOCTRINE OF SEPARATION OF POWERS PERMITS LITTLE JUDICIAL INTERFERENCE WITH CONGRESS' USE OF SECRET DATA, AND ONLY BECOMES RELEVANT WHEN A FORMAL REQUEST FOR THE DATA HAS BEEN MADE PURSUANT TO AN AUTHORIZED CONGRESSIONAL INVESTIGATION OR ACTIVITY.

Although once a committee or subcommittee has in fact requested trade secret information, separation of powers demands that courts do little to interfere with how Congress deals with such information; it is only when a formal committee or subcommittee request, or request by committee chairman pursuant to an authorized investigation or activity has been made that doctrine of separation of powers becomes relevant at all.

15. REQUIRING FTC TO ASCERTAIN THE VALIDITY OF CONGRESSIONAL SUBPOENAS AND FORMAL REQUESTS BEFORE RELEASING STATUTORILY PROTECTED DATA IS APPROPRIATE, SINCE

CONGRESS ITSELF HAS BEEN CONCERNED WITH PREVENTING THE ISSUANCE OF UNAUTHORIZED SUBPOENAS.

As Congress itself has manifested a concern to prevent issuance of subpoenas by individual members as opposed to committees, subcommittees or duly authorized committee chairman, it is appropriate to require Federal Trade Commission to take steps to ascertain validity of a subpoena, or formal request it treats as subpoenas, before it releases data it is required by statute to be kept confidential.

16. ALTHOUGH FTC CANNOT BE BOUND TO RESTRICTIVE PROCEDURES IN RESPONDING TO FORMAL CONGRESSIONAL REQUESTS FOR "TRADE SECRETS," COMMON SENSE DICTATES THAT COMMISSION VERIFY THE VALIDITY OF SUCH REQUESTS BEFORE RELEASING SENSITIVE DATA.

Although Federal Trade Commission cannot be required to observe certain procedures to limit manner in which it responds to formal requests for "trade secrets" from Congress or its committees, it is nothing more than common sense for FTC to not disclose trade secrets except upon legally authorized requests therefor and to verify that fact before delivery.

17. CONGRESS COULD NOT HAVE INTENDED THAT FTC DIVULGE "TRADE SECRETS" UPON CASUAL REQUEST OF A CONGRESSMAN, SINCE IT HAD EXPLICITLY EXCLUDED SUCH DATA FROM MATERIAL FTC MAY PROPERLY DISCLOSE.

Since Congress intended to prohibit Federal Trade Commission from disclosing "trade secrets," it could not be assumed that Congress meant to allow divulgement of those secrets on casual request of individual congressmen.

18. SINCE REQUEST THAT CONFIDENTIAL DATA BE MADE "AVAILABLE TO THE SUBCOMMITTEE" WAS SIGNED ON OFFICIAL STATIONERY BY THE SUBCOMMITTEE CHAIRMAN WHO WAS EMPOWERED TO ISSUE SUBPOENAS AUTHORIZED BY THE SUBCOMMITTEE, IT WAS REASONABLE THAT FTC TREAT IT AS A FORMAL REQUEST AND RELEASE THE DATA ACCORDINGLY.

Since Senate rules empowered chairman of Subcommittee on Antitrust and Monopoly to issue subpoenas for proper purposes authorized by subcommittee, and since request presented to Federal Trade Commission was signed by chairman on official stationery and requested that "the Commission make available to the *Subcommittee* that data which it has gathered on coal and uranium reserves," it was reasonable for Commission on receiving the letter to treat it as an authorized formal request and to disclose the information to the Commission.

19. IN APPEAL FROM DENIAL OF INJUNCTIVE RELIEF AGAINST DISCLOSURE OF CONFIDENTIAL DATA PURSUANT TO CONGRESSIONAL REQUEST, APPELLANTS' BURDEN OF SHOWING THAT TRIAL COURT ABUSED ITS DISCRETION IS HEIGHTENED BY FACT THAT PUBLIC INTEREST CLEARLY LIES IN MAXIMIZING CONGRESS' INVESTIGATORY POWERS.

[585] Not only does an appeal from a denial of injunctive relief against disclosure of confidential data by Federal Trade Commission pursuant to congressional request require a showing that the trial court abused its discretion, but also the burden on the appellants is considerably heightened by the clear public interest in maximizing the effectiveness of the investigatory powers of Congress; the welfare of the public is a factor to be weighed in determining whether to issue an injunction, and the investigatory power is one that the courts have long perceived as essential to the successful discharge of the legislative responsibility of Congress.

20. INJUNCTIONS ARE WARRANTED ONLY WHERE INJURIES ARE EXTANT OR IMMINENT.

Injunctions will not issue to prevent injuries neither extant nor presently threatened, but only merely feared.

Appeals were taken from a judgment of the United States District Court for the District of Columbia, Pratt, J., refusing to grant injunctive or declaratory relief with respect to divulgence to Congress of "trade secrets" obtained by Federal Trade Commission under compulsion of a subpoena and denying a stay pending appeal. The Court of Appeals, MacKinnon, Circuit Judge, held that: (1) absent a showing that it is evident that Congress intends to make "trade secrets" divulged to it by FTC publicly available, the Commission may, on proper demand, release "trade secrets" to the Congress without necessity of prior notice to parties involved unless the Commission has obtained such information on an agreement to give prior notice to parties; (2) in absence of a concrete violation of law, rule or regulation, the FTC cannot be required prior to disclosure to obtain assurances from the Congress that confidential information will not be publicly disclosed unless a majority of the members of the committee or subcommittee vote to do so; (3) the FTC is not required to precisely ascertain that the Congress specifically desires access to "trade secrets," not merely more general, and less confidential, data; (4) the FTC must, however, disclose the information only after it has received a proper request or subpoena from the Congrress, and (5) injunctive relief in such matters is not warranted when there is no significant present injury to weigh against public interest in unimpeded congressional investigation.

Affirmed.

(Syllabus, with substituted captions, taken from 589 F.2d 582)

Appeals from the United States District Court for the District of Columbia.

Robert B. Owen, Washington, D.C., for appellant Exxon Corp.; argued on behalf of all appellants.

J. Randolph Wilson and *Steven S. Rosenthal,* Washington, D.C., were on the brief, for appellant Kerr-McGee Corp.

James H. Wallace, Jr., and *Thomas C. Arthur,* Washington, D.C., were on the brief, for appellant Union Carbide Corp.

Gerald P. Norton, Acting Gen. Counsel, F.T.C., Washington, D.C., with whom *Earl J. Silbert,* U.S. Atty., *John A. Terry* and *Joel S. Perwin,* Asst. U.S. Attys., *Jerold D. Cummins,* Acting Asst. Gen. Counsel, and *Arthur W. Adelberg,* Atty., F.T.C., Washington, D.C., were on the brief, for appellees.

Michael R. Lemov, Washington, D.C., was on the brief, for amicus curiae, Congressman John E. Moss, urging affirmance.

Before ROBINSON, MACKINNON and ROBB, *Circuit Judges.*

Opinion for the court filed by Circuit Judge MACKINNON.

MACKINNON, *Circuit Judge:*

Exxon appeals from the district court's refusal to grant injunctive or declaratory relief and from its subsequent denial of a stay pending appeal. At issue is whether any protective measure should be imposed on the Federal Trade Commission (hereafter the "Commission" or

the "FTC") with respect to the divulgence to Congress of "trade secrets" obtained by it under the compulsion of a subpoena.[1] The controlling statute provides:

The [Federal Trade] Commission shall also have power—

* * * * * * *

(f) To make public from time to time such portions of the information obtained by it hereunder, *except trade secrets* and names of customers, as it shall deem expedient in the public interest . . .

15 U.S.C. § 46(f) (emphasis added). The parties do not dispute, nor could they after our decision in *Ashland Oil, Inc.* v. *FTC*, 179 U.S.App.D.C. 22, 548 F.2d 977 (1976), that Congress has a right of access to such infor[586]mation, including trade secrets. The issue before us concerns solely the question of notice to parties prior to disclosure of their confidential information and of safeguards to ensure the continued confidentiality of such information once disclosed to the Congress.

I

In 1975, pursuant to a subpoena, Exxon, Kerr-McGee, and Union Carbide made available to the Commission information relating to their ownership, operation of, and future expectations for their uranium holdings.[2] It is undisputed that some of this material involved trade secrets, particularly the data concerning the production and projected yield of individual mines. In April of 1976, in the course of considering S.489, 94th Cong., 1st Sess., which proposed prohibiting oil companies from owning interests in fuel reserves other than oil and gas, Senator Hart wrote to the Commission on official stationery of the Senate Judiciary Subcommittee on Antitrust and Monopoly requesting the Commission to make available all information it had concerning the coal and uranium holdings of the oil companies.[3] The

[1] There is no question that the information in question here qualifies under this court's definition of "confidential" information for purposes of the Freedom of Information Act, 5 U.S.C. § 552 (1970). In *National Parks and Conservation Assoc.* v. *Morton*, 162 U.S.App.D.C. 223, 228, 498 F.2d 765, 770 (1974), *rev'g* 351 F.Supp. 404 (D.D.C.1972) we stated that information will be considered confidential if its disclosure is likely to "cause substantial harm to the competitive position of the person from whom the information was obtained." Production forecasts such as are at question in this case would clearly cause such competitive harm were they disclosed to competitors. *See* JA 64 (Dickeman Affidavit for Exxon Co.); JA 73 (Zitting Affidavit for Kerr-McGee Co.); JA 78 (Thurber Affidavit for Union Carbide Co.). Trade Secrets and other confidential data are not immune to FTC investigation. *Covey Oil Co.* v. *Continental Oil Co.*, 340 F.2d 993 (10th Cir.), *cert. denied*, 380 U.S. 964, 85 S.Ct. 1110, 14 L.Ed.2d 155 (1965). For the broad range of the Commission's subpoena power in general, *see, e.g., Menzies* v. *FTC*, 242 F.2d 81 (4th Cir.), *cert. denied*, 353 U.S. 957, 77 S.Ct. 863, 1 L.Ed2d 908 (1957); 12 Von Kalinowski, Trade Regulation § 86.06 (1977).

[2] Appellant Union Carbide also submitted, and sought to protect, data relating to its coal holdings. Government Brief at 2-3.

[3] Senator Hart at the time was Chairman of the Senate Subcommittee on Antitrust and Monopoly. He wrote to the FTC following receipt of a letter from Senator Abourezk, also a member of the Subcommittee on Antitrust and Monopoly. In his letter Senator Abourezk suggested that the information in the FTC's possession was "crucial" to the consideration of S. 489. JA 61.

F.T.C., because of the relationship of its functions to those of Congress, treats such congressional requests as compulsive, even though they lack the formal status of congressional subpoenas. However, the Commission had previously assured the companies in writing that in the event of any congressional request for confidential information (trade secrets), it would both advise the Members of Congress who submitted the request that the information should be considered confidential when received, and give the companies themselves ten days prior notice of disclosure, whenever such notice was "reasonably possible" (Government's Brief at 2-3).

In early May, the Commission notified appellants of the subcommittee's requests, and appellant Union Carbide quickly obtained a court order restraining the disclosure of the requested information until ten days after the decision in the then pending *Ashland Oil, Inc.* v. *F.T.C.* case. Shortly after the Union Carbide order was issued, the subcommittee forwarded a formal request for *immediate* access to the information, and the Commission informed the parties that it would disclose the data requested the following day, except insofar as protected by the court order obtained by Union Carbide. At this point, Kerr-McGee and Exxon also succeeded, despite only 23 hours advance notice, in obtaining a preliminary injunction barring disclosure until the decision in *Ashland Oil.*

Some months later, in September, 1976, in *Ashland Oil, Inc. v. F.T.C.,* 179 U.S.App.D.C. 22, 548 F.2d 977 (1976) this court decided that it was permissible for the Commission to disclose confidential information to Congress.[4] The district court thereupon dissolved the preliminary injunction granted to appellants, on the grounds that they were unlikely to succeed on the merits, as *Ashland Oil* had determined that disclosure to Congress did not constitute "public disclosure," and also that the companies were not threatened with irreparable injury.[5] The district court also denied appellants' request that the Commission be required to give ten days advance notice before reveal[587]ing trade secrets to Congress. From this decision the appellants briefly obtained a stay pending appeal or until "further order of this Court,"[6] but this stay too was later vacated in light of *Ashland Oil.*[7]

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[4] *Ashland Oil* did not consider or determine the amount of notice the Commission might be required to give corporations whose trade secrets were to be divulged to Congress, or what steps the Commission should or could take to safeguard the confidentiality of these secrets once revealed to Congress. The question in *Ashland Oil* simply was whether or not the F.T.C. was authorized to divulge trade secrets at all, in light of 15 U.S.C. § 46(f)'s prohibition against "making public" such secrets. Likewise *Ashland Oil* did not consider the issue of liability for damages resulting from the disclosure of trade secrets in violation of 15 U.S.C. § 46(f).

[5] JA 90.

[6] JA 92, Order of March 30, 1977.

[7] JA 96, Order of May 6, 1977.

Some of the information that the appellants sought to protect has already been disclosed and this appeal is moot as to this material.[8] Other information, although vulnerable to disclosure whenever Congress may request it, remains undivulged.[9] As regards this information, and appellants' general request that the Commission be required to give ten days notice prior to disclosure, and that reasonable steps be required to ensure that Congress will keep such trade secrets confidential, the issues before us are not moot, and we resolve them here.[10]

It should be noted, however, that a large part of the questions raised by appellant while not moot, represent an attempt to have this court virtually engage in rulemaking for the FTC.[11] Our situation is somewhat analogous to those in which expansive conceptions of standing and ripeness have occasioned adjudications in which the courts have been cast in the inappropriate, and possibly *ultra vires*, role of attempting to resolve essentially abstract questions in reviewing agency regulations, *see, e.g., ASARCO, Inc.* v. *EPA*, 188 U.S.App.D.C. 77, 578 F.2d 319 (1978) (MacKinnon, J., concurring in part and dissenting in part). In this case, appellants request this court to assume the inappropriate and potentially overreaching role of promulgating confidentiality guidelines for the Commission. We have, however, explicitly restricted our judgment in a previous case dealing with similar issues to the facts of that case, eschewing establishing any broad principle limiting the Commission's actions, *see FTC* v. *Texaco, Inc.*, 180 U.S.App.D.C. 390, 555 F.2d 862 (*en banc*), *cert. denied*, 431 U.S. 974, 97 S.Ct. 2940, 53 L.Ed.2d 1072 (1977) and we see no reason, nor any justification for doing otherwise in deciding this appeal.

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[8] The information disclosed consisted of the data concerning Union Carbide's coal holdings.

[9] Senator Kennedy, the new Chairman of the Subcommittee on Antitrust and Monopoly, expressed the continued interest of the Subcommittee in the information originally requested by the late Senator Hart by a letter to Judge Leventhal of this Circuit Court, dated April 13, 1977. Senator Moss, Chairman of the Senate Committee on Oversight and Investigation, by letter of April 19, 1977 to the Clerk of the United States Court of Appeals expressed a similar interest. The status of these letters in this proceeding is unclear since the record does not indicate the authority for their issuance.

[10] If the FTC during the course of this appeal discloses the as yet undivulged information, this appeal will become moot as regards such information. However, appellant's request that the court issue a protective order requiring certain procedures to protect confidential data in the hands of the FTC when such data is requested by Congress will not itself be mooted by the disclosure of the information involved in this particular case. A suit for an injunction is not moot where the action which plaintiff seeks to enjoin may recur in the future. *United States* v. *Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 89 S.Ct. 361, 21 L.Ed.2d 344 (1968); *see also, United States* v. *W.T. Grant Co.*, 345 U.S. 629, 73 S.Ct. 894, 97 L.Ed. 1303 (1953). The FTC admits that it fully intends to hold open the option of disclosing trade secrets in the future without the safeguards sought by appellants. The fact that some issues in a case have become moot does not prevent a court from reviewing nonmooted issues where these are sufficiently significant that the cause of action remains justiciable, *e.g., Super Tire Engineering Co.* v. *McCorkle*, 416 U.S. 115, 94 S.Ct. 1694, 40 L.Ed.2d 1 (1974); *United Public Workers* v. *Mitchell*, 330 U.S. 75, 67 S.Ct. 556, 91 L.Ed. 754 (1946); 6A J. Moore, Federal Practice § 57.13 at 57-121-125.

[11] Appellants assert (*see* Reply Brief for Appellant Exxon at 31-35) that the purpose of obtaining notice prior to disclosure is to have sufficient time to seek judicial review of the proposed divulgement. In this case, however, all appellants were able on very short notice to secure prior judicial review. Thus the fact pattern before this court is a particularly inappropriate one in which to evaluate the damage that might result if a company were unable to obtain judicial review before disclosure as the court does not have before it any evidence of the effect of such denial.

II

[1] Concerning appellants' prayer for a permanent injunction requiring ten days [588] warning to affected parties before the FTC can disclose confidential data pursuant to congressional request, although we are very sympathetic to the need to protect the owners of valuable trade secrets, *e. g., Underwater Storage, Inc. v. United States Rubber Co.,* 125 U.S.App.D.C. 297, 301, 371 F.2d 950, 954 (1966), *cert. denied,* 386 U.S. 911, 87 S.Ct. 859, 17 L.Ed.2d 784 (1967),—and would allow them to be disclosed only upon valid *formal* requests of Congress or its committees, see part V, *infra*—we consider, given no more basis for such an injunction than what is presented here, that no basis exists for us to inject the courts into what is only an incipient controversy.

The authority of the subcommittee to make a proper request for information of the nature that appellants seek to protect is not questioned. The disclosure was not to be used as "exposure for exposure's sake," see *Watkins v. United States,* 354 U.S. 178, 77 S.Ct. 1173, 1 L.Ed.2d 1273 (1957), and the subject of the subcommittee's inquiry was one "on which legislation could be had" and thus was a proper topic of Congressional inquiry, *McGrain v. Daugherty,* 273 U.S. 135, 177, 47 S.Ct. 319, 71 L.Ed. 580 (1927); *Braden v. United States,* 272 F.2d 653 (5th Cir. 1959); *Sacher v. United States,* 102 U.S.App.D.C. 264, 252 F.2d 828, *rev'd on other grounds,* 356 U.S. 576, 78 S.Ct. 842, 2 L.Ed.2d 987 (1958). The material that the FTC proposed to divulge, then, was fully within the scope of the legislature's legitimate investigatory powers.

For this court on a continuing basis to mandate an enforced delay on the legitimate investigations of Congress whenever these inquiries touched on trade secrets could seriously impede the vital investigatory powers of Congress and would be of highly questionable constitutionality. While normally reasonable advance notice can be required, in exigent circumstances Congress has full authority to issue forth with subpoenas and formally request immediate disclosure. To impose a mandatory notice period would skirt dangerously close to being at least the temporary "equivalent to an order quashing [the official request or subpoena] which is generally an impermissible frustration of the congressional power to investigate . . ." *United States* v. *American Tel. & Tel. Co.,* 179 U.S.App.D.C. 198, 202, 551 F.2d 384, 388 (1976), *citing Eastland* v. *United States Servicemen's Fund,* 421 U.S. 491, 506, 95 S.Ct. 1813, 44 L.Ed.2d 324 (1975) and hence would raise serious constitutional issues. It would also abrogate the broad discretion of the Commission, *e.g., FTC* v. *Lonning,* 176 U.S.App.D.C. 200, 209, 539 F.2d 202, 211 (1976),—through which the FTC can make use of its considerable

expertise to balance the private and public interest involved—to formulate its own reasonable confidentiality protection, *see FTC* v. *Anderson*, 442 F.Supp. 1118 (D.D.C.1977).[12]

To impose any mandatory advance notice would run directly counter to the spirit expressed in *Eastland* v. *United States Servicemen's Fund, supra:*

> This case illustrates vividly the harm that judicial interference may cause. A legislative inquiry has been frustrated for nearly five years, during which the Members and their aide [sic] have been obliged to devote time to consultation with their counsel concerning the litigation, and have been distracted from the purpose of their inquiry. The Clause [the Speech or Debate Clause] was written to prevent the need to be confronted by such "questioning" and to forbid invocation of judicial power to challenge the wisdom of Congress' use of its investigative authority.

421 U.S. at 511, 95 S.Ct. at 1825.

The inquiry in *Eastland* differed from that in the present appeal,[13] but the deci[589]sion's emphasis on the necessity for courts to refrain from interfering with or delaying the investigatory functions of Congress has an obvious relevance to appellants' demand that we impose a ten day delay on the FTC's compliance with any Congressional request for certain information.

[2] Furthermore there is no indication that disclosure to the Subcommittee on Antitrust and Monopoly will in any way harm the appellants. We have heretofore held that release of information to the Congress does not constitute "public disclosure," *Ashland Oil, supra,* 179 U.S.App.D.C. at 24, 548 F.2d at 979; *Exxon* v. *F.T.C.,* No. 76-0812 (D.D.C. March 29, 1977) at 1. Because such divulgement is not "public," it does not in itself impair the value of the trade secrets involved, and thus does not involve a deprivation prior to which a hearing is required. Thus, the protection of a judicial order, which mandating advance notice would require, is not necessary before such disclosure in order to accord with principles of due process, *see Roth* v. *Bd. of Regents,* 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972); *Perry* v. *Sindermann,* 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972). The courts must presume that the committees of Congress will exercise their powers responsibly and with due regard for the rights of affected parties. *Ashland Oil* v. *FTC, supra,* 179 U.S.App.D.C. at 24, 548 F.2d at 979, *quoting Ashland Oil* v. *FTC,* 409 F.Supp. 297, 308 (D.D.C.1976); *see also, Safeway Stores, Inc.* v.

[12] The FTC argues that it would be without authority to resist forthwith subpoenas or formal requests for an immediate response. Brief for FTC at 20. Forthright subpoenas in the areas involved in these cases are certainly a rarity because of the time necessary to gather the information and the speed with which congressional committees function.

[13] *Eastland* held that the subpoena of certain bank records from organizations being investigated as potentially harmful to the morale of the armed services was within the "legitimate legislative sphere" and that the Speech or Debate Clause precluded judicial interference with congressional investigations within this sphere.

FTC, 428 F.Supp. 346, 347 (D.D.C.1977). In sum, we reaffirm our rationale in *Ashland Oil* that absent a showing that it is "evident" that Congress intends to make trade secrets divulged to it by the FTC publicly available, the Commission may, upon proper demand, release such secrets to the Congress without the necessity of prior notice to the parties involved, unless of course the Commission obtained such information upon an agreement to give prior notice to the party.[14]

Our decision in *FTC* v. *Texaco, Inc., supra*, 180 U.S.App.D.C. at 412, 555 F.2d at 884 in which ten days notice was required by the court with respect to a specific request does not in any way conflict with our refusal here to order a similar general warning period. We do not interpret *Texaco* as authority for establishing such a period as a general requirement for FTC disclosure of trade secrets to Congress. In that case we explicitly stated:

> The Court is *not* herein adopting a rule of general applicability for a 10-day notice provision. It is rather adopting for purposes of this case a proposal for confidentiality *advanced by FTC* . . .

180 U.S.App.D.C. at 412, 555 F.2d at 884 n. 64 (emphasis added). Clearly this court's decision to accept the F.T.C.'s own proposed settlement in a case which—as the district court noted[15]—was distinguishable on its facts from the present one, is not precedent for imposing a ten day rule in the situation before us now. Moreover, we also noted in *Texaco* that *F.C.C.* v. *Schreiber*, 381 U.S. [590] 279, 295-296, 85 S.Ct. 1459, 14 L.Ed.2d 383 (1965) made clear that "it is the agencies, not the courts, which should, in the first instance, establish the procedures for safeguarding confidentiality," 180 U.S.App.D.C. at 412, 555 F.2d at 884 n. 62. The Commission has recently issued a notice of proposed rulemaking involving its protection of confidential information, 43 Fed.Reg. 3571 (January 26, 1978).[16] It would be completely inappropriate in light of our interpretation of the *Schreiber* case, and the view we take of our judicial authority, to interfere at this point and impose what in effect would

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[14] We thus decline to impose on the Commission either an unqualified ten day warning requirement or the more flexible alternative of mandating simply "reasonable prior notice." We have recently held in the specific context of congressional requests for confidential data from the F.T.C. that release to the Congressional Committee is not "public disclosure," *Ashland Oil* v. *FTC, supra*. Thus, such disclosure does not in itself injure appellants. Furthermore, as a general principle, judicial intervention to prevent potential injury from prospective government misconduct is only justified when such misconduct is imminent, not merely hypothetical, *Reporters' Committee for Freedom of the Press* v. *A.T.&T.*, (1978), citing *Rizzo* v. *Goode*, 423 U.S. 362, 96 S.Ct. 598, 46 L.Ed.2d 561 (1976); *Allee* v. *Medrano*, 416 U.S. 802, 94 S.Ct. 2191, 40 L.Ed.2d 566 (1974); and *Laird* v. *Tatum*, 408 U.S. 1, 92 S.Ct. 2318, 33 L.Ed.2d 154 (1972). To authorize such supervision as the appellants request would not only do violence to the presumption that congressional bodies will act responsibly, *Ashland Oil* v. *FTC, supra*, but also would place a significant impediment in the path of governmental investigations of important aspects of our economy.

[15] JA 84.

[16] The proposed rules provide that, in response to congressional requests for confidential data, "ten days notice shall be given *where possible*" (emphasis added), 43 Fed.Reg. 3574 (January 26, 1978). It would seem that the rule should provide that in all instances the party will be notified immediately whenever Congress makes a proper request for trade secrets.

be a general protective order upon the F.T.C., *see also, F.T.C.* v. *United States Pipe and Foundry Co.*, 304 F.Supp. 1254, 1260 (D.D.C.1969); Gelhorn, *The Treatment of Confidential Information by the Federal Trade Commission: Pretrial Practices*, 36 U.Chi.L.Rev. 113, 126 (1968).

III

[3, 4] Appellants' further contention that prior to disclosure the FTC should obtain assurances that confidential information will not be publicly disclosed unless a majority of the members of the committee or subcommittee vote to do so, deserves only perfunctory discussion. Again, we are sympathetic to appellants' concern for safeguarding highly confidential information worth millions of dollars, but for this court on this record to establish any such requirement would clearly involve an unacceptable judicial intrusion into the internal operations of Congress. Although the courts will intervene to protect constitutional rights from infringement by Congress, including its committees and members, *e.g., Yellin* v. *United States*, 374 U.S. 109, 143-144, 83 S.Ct. 1828, 10 L.Ed.2d 778 (1973); *Watkins* v. *United States, supra; United States* v. *Ballin*, 144 U.S. 1, 5, 12 S.Ct. 507, 36 L.Ed. 321 (1892); *Jordan* v. *Hutcheson*, 323 F.2d 597 (4th Cir. 1963), where constitutional rights are not violated, there is no warrant for the judiciary to interfere with the internal procedures of Congress, *e.g., Consumers Union of the United States* v. *Periodical Correspondents Assoc.*, 365 F.Supp. 18, 24 (D.D.C.1973), *rev'd on other grounds*, 169 U.S.App.D.C. 370, 515 F.2d 1341 (1975); *Consumers Union of the United States* v. *Periodical Correspondents Assoc.*, 169 U.S.App.D.C. 370, 376-377, 515 F.2d 1341, 1347-1348 (1975). This court cannot assume that Congress will act irresponsibly in regulating or disclosing appellants' trade secrets. Barring the imminence of such disclosure, appellants' constitutional rights are not in fact jeopardized by delivery of their secrets to Congress. On this record there is no justification for this court to interfere with the operations of the legislative branch, *see, Frothingham* v. *Mellon*, 262 U.S. 447, 488, 43 S.Ct. 597, 67 L.Ed. 1078 (1923); *Decatur* v. *Paulding*, 39 U.S. (14 Pet.) 497, 10 L.Ed. 559 (1840); *Protestants and Other Americans for Separation of Church and State* v. *O'Brien*, 272 F.Supp. 712 (D.D.C.1967).

[5-7] It would exceed our jurisdiction for this court to require guarantees of specific congressional procedures in advance of any concrete threat to appellants' vital interests. The strong and long-standing principle of judicial abstention into the actions of the legislature demands that the courts, "avoid the possibility of unwarranted interference with a coordinate branch of government, by re-

quiring dismissal of applications [seeking to restrain congressional committees' use of information] not substantiated by a showing of need arising out of immediate threats to constitutional rights," *Cole* v. *McClellan*, 142 U.S.App.D.C. 24, 25, 439 F.2d 534, 535-536 (1970); *e.g.*, *Davis* v. *Ichord*, 143 U.S.App.D.C. 183, 442 F.2d 1207 (1970). Courts should refrain from creating "needless friction" with a coordinate branch of government, *Railroad Comm'n* v. *Pullman Co.*, 312 U.S. 496, 500, 61 S.Ct. 643, 85 L.Ed. 971 (1941); *Ansara* v. *Eastland*, 143 U.S.App.D.C. 29, 31, 442 F.2d 751, 753 (1971), and imposing a particular voting require[591]ment to operate in the manner of a Congressional Rule, on the grounds that such a safeguard is necessary to ensure that Congress will act responsibly with secrets entrusted to it, is not only not refraining from, but actually provoking such "needless friction." The FTC and this court are compelled to rely on the assumption that Congressional committees will act responsibly with confidential data revealed to them, *Ansara* v. *Eastland*, *supra*, 143 U.S.App.D.C. at 32, 442 F.2d at 754; *Ashland Oil* v. *F.T.C.*, 409 F.Supp. 297, 308 (D.D.C.), *aff'd* 179 U.S.App.D.C. 22, 548 F.2d 977 (1976).

[8] If, in fact, a Member or congressional staff member improperly "leaks" confidential data, the injured parties have a recourse against that individual directly,[17] and the possibility of such action will serve to deter unjustified disclosure of trade secrets. Beyond provision for such suits, and in the absence of a concrete violation of law, rule or regulation, the courts are unable to aid the appellants in their request to oversee the activities of the legislature, allegations of the prevalence of "leaks" from some committees notwithstanding. The FTC should, and does, alert Congress when the information made available to it is confidential. In fact, some such cautionary statement could be impliedly required from the prohibition on the public disclosure of trade secrets imposed by 15 U.S.C. § 46(f). If the Commission failed to alert Congress to the fact that information being supplied to it was by statute prohibited from "public" disclosure the Commission would violate a duty implicitly imposed upon it by the statute. To impose further protective procedures upon Congress, without some immediate threat of illegal disclosure, would impermissibly interfere with the legislative branch—an action we refuse to take.

IV

[9] Appellants also ask this court to require the FTC precisely to ascertain that the Congress specifically desires access to trade

[17] An official or employee of the Commission who makes an unauthorized public disclosure of confidential information may be guilty of a misdemeanor, *see* 16 C.F.R. § 4.10(c); *see also*, 12 Von Kalinowski, Trade Regulation § 89.04[2] at 89-33 (1977).

secrets, not merely more general (and less confidential) data, before it divulges such information. Of course, the FTC should not simply disclose trade secrets to Congress "sua sponte." The Commission, however, will invariably know the nature of the information in its possession far more accurately than Congress, and oftentimes may be aware of data clearly pertinent to an investigation of which Congress has no knowledge or information. We would not restrict the right, prior to congressional demand of the Commission to discuss with Members of Congress or their staff the general nature of available data and thus use its expertise to inform the legislature of relevant information of which the Congress may often be unaware.[18] Barring some prohibition, governmental agencies may interchange information. Most problems in this connection will be obviated if the Commission merely notifies Congress whenever confidential trade secrets are requested or involved in potential delivery. In III, *ante,* we noted the obligation of the Commission to do this.

V

[10] It is important to emphasize that our denial of appellants' requested injunc[592]tive and declaratory relief designed to limit the manner in which the F.T.C. may *respond* to a subpoena or formal request issued by Congress, does not address the question of when such a request or subpoena has been *properly issued.* While we are unable to agree with appellants' request for advance restrictions on the Commission's response to formal requests or subpoena, we feel that there is ample justification for insisting that the Commission only reveal statutorily protected *trade secrets* when it has indeed received such a proper request or subpoena.

[11] There is no doubt that the subpoena power may be exercised on behalf of Congress by either House, *Eastland* v. *United Servicemen's Fund, supra; see* 2 U.S.C. § 190b(a) (1976); House Rule XI cl. 2(A), and that the subpoenas issued by committees have the same authority as if they were issued by the entire House of Congress from which the committee is drawn, *e.g., In Re Motion to Quash Subpoenas and Vacate Service,* 146 F.Supp. 794 (W.D.Pa.1956). To issue a valid subpoena, however, a committee or subcommittee must conform strictly

[18] Imposing a general restriction on the FTC's ability to assist Congress in the latter's investigations would be unjustified particularly in light of the fact that the Commission was formed in part to act as an arm of the legislature, assisting Congress in its investigations. A member of the Conference Committee on the bill that originally established the F.T.C., Congressman Stevens, explained that:

[The Commission] has the power to investigate for the benefit of Congress. It really performs the functions of a committee of Congress in the line of investigation and compilations and recommendations. It can ascertain all the facts, as we constitutionally have the power to do, or we can commit that power to a Commission or to a committee to do that. That is what we do in this case. It is an especially valuable function, and its beneficial work will be along the line of recommendation to Congress and the President. 51 Cong.Rec. 14935 (1914).

to the resolution establishing its investigatory powers, and only those parties expressly authorized to sign subpoenas may do so validly. For example, where the resolution granting subpoena power to a committee stated that subpoena would be issued only by the whole committee, not even the Chairman himself could individually issue such a document, *Liveright* v. *United States,* 120 U.S.App.D.C. 379, 347 F.2d 473 (1965); *see also, Shelton* v. *United States,* 117 U.S.App.D.C. 155, 327 F.2d 601 (1963).

The resolution which in *Liveright* was held not to justify the Chairman's issuing a subpoena by himself is nearly identical to that of 2 U.S.C. § 190b(a) governing the subpoena power of Senate committees and subcommittees. The resolution specified that "the committee or any duly authorized subcommittee thereof is authorized . . . to require by subpoena." Whereas the statute states that "[e]ach standing committee of the Senate, including any subcommittee of any such committee, is authorized . . . to require by subpoena or otherwise." The clear intent of 2 U.S.C. § 190b(a), is that only *committees* or *subcommittees* can issue subpoenas in the name of the committee or subcommittee, and *Liveright* indicates how narrowly the number of persons entitled to issue subpoenas is to be interpreted.

[12, 13] The purpose behind the limitation on the members of a committee or subcommittee who may issue subpoenas in its name is illuminated by the House Rule on this subject:

> A subpoena may be authorized and issued by a committee or subcommittee under subparagraph (1)(B) in the conduct of any investigation or series of investigations or activities, *only when authorized by a majority of the members voting, a majority being present.* The power to authorize and issue subpoenas under subparagraph (1)(B) may be delegated to the chairman of the committee pursuant to such rules and under such limitations as the committee may prescribe. Authorized subpoenas shall be signed by the chairman of the committee or by any member designated by the committee.

Rule XI cl. 2(m)(2)(A) Manual and Rules of the House of Representatives, 95th Congress (emphasis added).[19] This rule is plainly directed at eliminating the possibility that an individual member of a committee will—solely on his own initiative—issue a "subpoena" compelling production of evidence, and a similar purpose can be discerned in 2 U.S.C. § 190b(a). The principle [593] is important that disclosure of information can only be compelled by authority of Congress, its committees or subcommittees, not solely by individual members; and only for investigations and congressional activities.

[19] The reform rule adopted by the 94th Congress required subpoenas to be "authorized by a *majority of the members of the committee* . . ." *Id.,* cl. 2(m) (emphasis added). *See Ashland Oil, Inc.* v. *FTC,* 179 U.S.App.D.C. 22, 30-36, 548 F.2d 977, 985-991 (1976). The reform, however, was short lived, as the 95th Congress changed the rule to only require "a majority of the members voting, a majority being present."

The Senate rule authorizes "[e]ach standing committee . . . including any subcommittee of any such committee . . . to require by subpoena or otherwise the attendance of such witnesses and the production of such . . . documents [etc.] . . . as it deems advisable." Rules and Manual of the United States Senate, 95th Congress, § 190b.(a), p. 363 (1977).

Election to the Congress does not give an individual subpoena power over whatever information he may happen to be interested in, and particularly not over trade secrets, whose oftentimes enormous value may be forfeited by disclosure to the public.

[14, 15] Although once a committee or subcommittee has in fact requested trade secret information, the separation of powers demands that the courts do little to interfere with how the Congress deals with this information; it is only when a formal committee or subcommittee request, or request by the committee chairman pursuant to an authorized investigation or activity, has been made that the doctrine of separation of powers becomes relevant at all. And as Congress itself has manifested a concern to prevent the issuance of subpoenas by individual members as opposed to committees, subcommittees or duly authorized committee chairmen, it is appropriate to require the FTC to take steps to ascertain the validity of a subpoena (or the formal requests it treats as subpoenas) before it releases data it is required by statute to be kept confidential.

[16, 17] Since the Freedom of Information Act makes a great deal of information available to the public and the FTC may volunteer certain *ordinary information* without any formal request, there does not seem to be any need for requiring the FTC to determine whether or not a request for such information is in fact a proper formal request or subpoena. However, *trade secrets* are explicity excluded from that material which the Commission may in its good discretion "make public." 15 U.S.C. § 46(f), *supra. See Bristol-Myers Co.* v. *FTC,* 138 U.S.App.D.C. 22, 25, 424 F.2d 935, 938, *cert. denied,* 400 U.S. 824, 91 S.Ct. 46, 27 L.Ed.2d 52 (1970). We thus note that Congress intended to prohibit the FTC from disclosing "trade secrets" and cannot therefore assume that it meant to allow divulgement of these secrets upon the casual request of individual Congressmen.[20] Accordingly, although we do not require the FTC to observe the procedures proposed by the appellants to limit the manner in which the Commission responds to *formal requests* for trade secrets from Congress or its committees it is nothing more than common sense for the FTC to not disclose trade secrets except upon legally authorized requests therefor and to verify that fact before delivery. Trade secrets, by statute, are in a different position than ordinary non-confidential information within the possession of the Commission.

[18] In this particular appeal, it does not clearly appear that the request sent to the FTC by Senator Hart was a "formal request" authorized by the subcommittee. The Commission, however, may

[20] We note that, in another context, Congress has manifested its solicitude to protect the interests of those individuals who are forced to entrust confidential data to agencies, *see, e.g.,* H.R.Rep. No. 1497, 89th Cong., 2d Sess. 6 (1966) (a report on the bill that became the Freedom of Information Act of 1967); *see generally,* Note, Reverse-Freedom of Information Act Suits: Confidential Information in Search of Protection, 70 Nw.U.L.Rev. 995 (1976).

have been previously informed of subcommittee action that satisfied the necessary formalities. The Senate rules empowered the Chairman of the Subcommittee on Anti-Trust and Monopoly to issue subpoenas for proper purposes authorized by the subcommittee, and the requests presented to the FTC in this case were signed by Senator Hart, on official stationery and asked that "the Commission make available to the *Subcommittee* that data which it has gathered on coal and uranium reserves." (Emphasis added). When the Commission receives such a letter and it has knowledge that said investigation has been duly authorized, it is reasonable of it to treat it as an authorized formal request. Had Senator Hart himself written in a capacity other than that of Subcommittee Chairman, or had some other senator on the committee requested the confidential data, however, the statutory protection due to confidential trade secrets in the hands of the Commission, *see* 15 U.S.C. § 46(f); *FTC* [594] v. *Texaco, Inc., supra,* 170 U.S.App.D.C. 323 at 337, 517 F.2d 137, at 151, demands that it not release such sensitive information without verifying that the request satisfies the requirements of the controlling congressional rule.

VI

[19] As a final point, the fact that appellants are appealing from the district court's refusal to grant equitable relief places an exceptionally heavy burden on them if they are to succeed before this court. Not only does an appeal from a denial of injunctive relief require a showing that the trial court abused its discretion, *Public Affairs Associates, Inc.* v. *Rickover,* 369 U.S. 111, 112, 82 S.Ct. 580, 7 L.Ed.2d 604 (1962); *Hecht Co.* v. *Bowles,* 321 U.S. 321, 64 S.Ct. 587, 88 L.Ed. 754 (1944); *Meredith* v. *City of Winter Haven,* 320 U.S. 228, 235, 64 S.Ct. 7, 88 L.Ed. 9 (1943); *Independent Bankers Assoc. of America* v. *Smith,* 175 U.S.App.D.C. 184, 534 F.2d 921, *cert. denied,* 429 U.S. 862, 97 S.Ct. 166, 50 L.Ed.2d 141 (1976), but also the burden on these particular appellants is considerably heightened by the clear public interest in maximizing the effectiveness of the investigatory powers of Congress. The welfare of the public is a factor to be weighed in determining whether or not to issue an injunction, *e.g., Yakus* v. *United States,* 321 U.S. 414, 64 S.Ct. 660, 88 L.Ed. 834 (1944); *Hecht Co.* v. *Bowles, supra; Harrisonville* v. *W.S. Dickey Clay Mfg. Co.,* 289 U.S. 334, 53 S.Ct. 602, 77 L.Ed. 1208 (1933); *United States* v. *American Tobacco Co.,* 221 U.S. 106, 31 S.Ct. 632, 55 L.Ed. 663 (1911), and the investigatory power is one that the courts have long perceived as essential to the successful discharge of the legislative responsibilities of Congress, *McGrain* v. *Daugherty, supra.*

[20] It would, then, require an extremely strong showing by the appellants to succeed in obtaining an injunction in light of the compelling public interest in denying such relief. Furthermore, there is no significant private injury present here to weigh against the public interest in unimpeded congressional investigation, *see Ohio Oil Co.* v. *Conway*, 279 U.S. 813, 49 S.Ct. 256, 73 L.Ed. 972 (1928); 7 J. Moore, Federal Practice ¶ 65.18[3] at 65-138. Given the presumption of congressional propriety discussed above, *see also, Ansara* v. *Eastland, supra*—there is no risk of imminent injury to appellants. Injunctions, however, will not issue to prevent injuries neither extant nor presently threatened, but only merely "feared," *Connecticut* v. *Massachusetts*, 282 U.S. 660, 51 S.Ct. 286, 75 L.Ed. 602 (1931). To grant the injunction appellants request, this court would be required to interfere with the operation of Congress, and also to depart from traditional doctrine concerning the availability of equitable relief. Finding no justification for granting the relief requested by appellants, we affirm the judgment of the district court in its entirely.

Judgment accordingly.

RHINECHEM CORPORATION, ALLEGHENY LUDLUM INDUSTRIES, INC., and CHEMETRON CORPORATION

v.

FEDERAL TRADE COMMISSION*

No. 78 C 3445. F.T.C. Docket No. 9116.

(United States District Court, N.D. Illinois, October 20, 1978)

1. SINCE TRADITIONAL "EQUITY" STANDARD DOES NOT APPLY TO AGENCY-INITIATED ACTIONS, FTC MUST DEMONSTRATE ISSUANCE OF PRELIMINARY INJUNCTION TO ENJOIN CORPORATE ACQUISITION WOULD BE IN THE PUBLIC INTEREST.

   In determining propriety of issuance of preliminary injunction to enjoin proposed corporate acquisition, traditional "equity" standard of irreparable damage, probability of success on merits, and that balance of equities favors petitioner does not apply to FTC initiated actions under the Federal Trade Commission Act; rather, FTC must demonstrate that, weighing equities and considering Commission's likelihood of ultimate success, such action would be in public interest.

2. THE GOAL IN DETERMINING "RELEVANT MARKET" IS TO DELINEATE MARKETS WHICH CONFORM TO THE REALITIES OF COMPETITIVE PRACTICE. THE AREA OF EFFECTIVE COMPETITION MAY BE A SMALL SUBMARKET SUPPLYING SPECIALIZED PRODUCTS OR SERVICES.

   In determining what constitutes a relevant market for antitrust purposes, goal is to delineate markets which conform to areas of effective competition and to the realities of competitive practice; the area of effective competition may be a small submarket supplying specialized products or services.

3. UNIQUENESS OF PRODUCT'S FUNCTIONS AND USES IS THE PRIME FACTOR IN DELINEATING RELEVANT SUBMARKET.

   The most important factor in delineating a relevant submarket is uniqueness of product's functions and therefore its uses.

4. TWO PRODUCTS ARE CONSIDERED TO BE IN THE SAME MARKET IF THEY ARE REASONABLY INTERCHANGEABLE FOR THE SAME PURPOSES.

   If two products are reasonably interchangeable by consumers for the same purposes, they are considered to be in the same market, in determination of relevant market for antitrust purposes.

5. DEFINITION OF RELEVANT PRODUCT MARKET IS A FACTUAL QUESTION.

   Definition of relevant product market for antitrust purposes is a factual question.

6. INJUNCTIVE RELIEF IS NOT BARRED BY PRIVATE INJURIES THAT MAY RESULT FROM RESPONDENTS' DECISION TO ABANDON MERGER SHOULD FTC BE GRANTED SUCH RELIEF DURING PENDENCY OF ADMINISTRATIVE PROCEEDINGS AND SUBSEQUENT JUDICIAL REVIEW.

   Private injuries that might result from an injunction delaying corporate merger because of parties' own decision to cancel deal in event that injunction

*Reported in 459 F.Supp. 785 (1978).

was issued, were not of nature to preclude granting of injunctive relief to Federal Trade Commission during pendency of administrative review to [786] determine legality of merger under Federal Trade Commission Act.

7. GREAT WEIGHT MUST BE ACCORDED POTENTIAL INJURY TO THE PUBLIC RESULTING FROM LOSS OF COMPETITION BETWEEN MERGING COMPANIES PENDING FINAL DISPOSITION OF FTC'S COMPLAINT AND SHORTCOMINGS OF REMEDIAL DIVESTITURE, WHERE FTC MADE SUFFICIENT SHOWING OF LIKELIHOOD OF SUCCESS.

Where a sufficient showing of likelihood of success has been made by FTC in action to enjoin corporate acquisition under Federal Trade Commission Act, great weight is to be assigned to both potential injury to public stemming from loss of actual competition between acquiring and acquired company pending ultimate resolution of fate of FTC's complaint and the lingering injury caused thereby, as well as to potential injury to public caused by acknowledged shortcomings of remedy of divestiture.

8. FTC WAS GRANTED INJUNCTIVE RELIEF SINCE IT HAD MADE AN ADEQUATE SHOWING OF ULTIMATE SUCCESS AND ESTABLISHED THAT EQUITIES FAVORED ITS POSITION.

FTC made an adequate showing as to its likelihood of ultimate success and established that equities in case favored its position so that court entered injunction enjoining proposed corporate acquisition in organic pigments industry during pendency of administrative proceedings in any subsequent judicial review.

Federal Trade Commission brought suit to preliminarily enjoin a proposed corporate acquisition under the Federal Trade Commission Act. The District Court, Flaum, J., held that since FTC made adequate showing as to its "likelihood of ultimate success" and established that equities in case favored its position, entry of injunction to enjoin the corporate acquisition in organic pigments industry during pendency of administrative proceedings in any subsequent judicial review would be in public interest.

Order accordingly.

(Syllabus, with substituted captions, taken from 459 F.Supp. 785)

Lawrence E. Christensen, Chicago, Ill., for petitioner.

Charles W. Douglas, H. Blair White, Sidley & Austin, Chicago, Ill, *Thomas L. Van Kirk, Buchanan, Ingersoll, Rodewald, Kyle & Buerger,* Pittsburgh, Pa., for respondents.

MEMORANDUM OPINION

FLAUM, *District Judge:*

This matter comes before the court upon petitioner's Application for a Preliminary Injunction. For the reasons set forth below, the motion is granted.

The Federal Trade Commission (FTC) is an agency of the United States Government charged by law with, *inter alia*, the enforcement of the Federal Trade Commission Act, 15 U.S.C. § 41 *et seq.*, and the

Clayton Act, 15 U.S.C. §12 *et seq.* Rhinechem Corporation (Rhinechem), a Delaware corporation with its principal place of business in New York City, is a wholly-owned subsidiary of Bayer International Finance N.V., a Netherlands Antilles corporation, which, in turn, is a wholly-owned subsidiary of Bayer A.G. (Bayer), a large West German manufacturing corporation. Allegheny Ludlum Industries, Inc. (ALI) is a corporation organized and existing under the laws of Pennsylvania, with its principal place of business located therein. ALI transacts business within this district. Chemetron Corporation (Chemetron) is a Delaware corporation which both has its principal offices and transacts business within the Northern District of Illinois. The court is satisfied that respondents are engaged in "commerce" as defined in section 4 of the FTC Act, 15 U.S.C. § 44, and in section 1 of the Clayton Act, 15 U.S.C. § 12.

On June 9, 1978, Rhinechem agreed in principle to purchase the pigments division of Chemetron from ALI. On August 25, 1978, the three companies entered into a written agreement providing that the sale be consummated on August 30, 1978, or such other date as fixed by them. Pursuant to its belief that that agreement violated section 5 of the FTC Act, 15 U.S.C. § 45, and that the acquisition, if consummated, would be unlawful under section 5, as well as section 7 of the Clayton Act, 15 U.S.C. § 18, the FTC issued an administrative complaint against respondents on August 25, 1978. Further, as it felt that the maintenance of the status quo during the pendency of the administrative proceedings would be in the public interest, the FTC brought suit to preliminarily enjoin the proposed purchase under section 13(b) of the FTC Act, 15 U.S.C. § 53(b).

That section gives this court jurisdiction over this case. Respondents have chosen not to challenge the FTC's choice of venue.

The Statutory Standard

Section 13(b) provides, in pertinent part, that [787]

> (b) Whenever the Commission has reason to believe—
>
> (1) that any . . . corporation is violating, or is about to violate, any provision of law enforced by the Federal Trade Commission, and
>
> (2) that the enjoining thereof pending the issuance of a complaint by the Commission and until such complaint is dismissed by the Commission or set aside by the court on review, or until the order of the Commission made thereon has become final, would be in the interest of the public—
>
> the Commission . . . may bring suit in a district court of the United States to enjoin any such act or practice. Upon a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest, and after notice to the defendant, a temporary injunction may be granted without bond . . ..

[1] This statutory enactment manifests Congress' "concern with the FTC's historic inability to effectuate a remedy once an acquisition is consumated". *FTC* v. *Lancaster Colony Corp., Inc.*, 434 F.Supp. 1088, 1096 (S.D.N.Y. 1977) (citation omitted). This concern is reflected in the unique "public interest" standard of judicial scrutiny of requests for injunctive relief contained in section 13(b). As the legislative history of that section makes clear, "the traditional 'equity' standard of irreparable damage, probability of success on the merits, and that the balance of equities favors the petitioner", H.R.Rep. No. 624, 93d Cong., 1st Sess. 21, *reprinted in* 2 U.S. Code Cong. and Admin. News, pp. 2523, 2533 (1973), does not apply to FTC-initiated actions under section 13(b).[1] *FTC* v. *Beatrice Foods Co.*, 188 U.S.App.D.C. 122, 580 F.2d 701 (1978); *FTC* v. *Lancaster Colony Corp.*, 434 F.Supp. 1088 (S.D.N.Y. 1977); *FTC* v. *Food Town Stores, Inc.*, 539 F.2d 1339 (4th Cir. 1976). Rather, the FTC must demonstrate "that, weighing the equities and considering the Commission's likelihood of ultimate success, such action [the issuance of an injunction] would be in the public interest." Therefore, the court must now examine the showing that the FTC has made in the instant case in light of its identification of these as the relevant factors.

THE LIKELIHOOD OF SUCCESS

In the case at bar, the FTC maintains that Rheinchem [sic] through its several subsidiaries, particularly its wholly-owned subsidiary, Harmon Colors Corporation (Harmon), and Chemetron are competitors in an American organic pigments market. It assigns them positions among the top firms in that market, according to size. It views the proposed acquisition, therefore, as resulting in the diminution of the competition in this industry, and it contends that the sale would have definite anticompetitive effects.

Respondents, on the other hand, deny the existence of an organic pigments market. They suggest that the proper market within which the merits of this transaction should be assessed is either an American colorants market or the submarkets thereof defined by colorants' end-uses.[2] Consequently, they regard the proposed acquisition as a kind of diversification. They propose that this purchase will result in the improvement of the quality of competition within the relevant product market, whichever of the alternative positions on the appropriate market definition is accepted.[788]

[1] In *FTC* v. *National Commission on Egg Nutrition*, 517 F.2d 485 (7th Cir. 1975), *cert. denied*, 426 U.S. 919, 96 S.Ct. 2623, 49 L.Ed.2d 372 (1976), the Court of Appeals for the Seventh Circuit had occasion to consider the impact of the adoption of section 13(b) upon its previous construction of section 13(a). Primarily, the court was interested in demonstrating that the enactment of section 13(b) was not intended to effect section 13(a). In this connection, it made a number of suggestions about the construction of section 13(b) itself that this court feels it would not follow upon plenary consideration. Therefore, this court deems *Egg Nutrition* not to be controlling precedent in this case.

[2] The FTC concedes that, if this market definition is adopted, it cannot justify the relief sought in this court.

Section 7 of the Clayton Act prohibits acquisitions the effect of which "may be substantially to lessen competition, or to tend to create a monopoly." Thus, "[d]etermination of the relevant product and geographic markets is 'a necessary predicate' to deciding whether a merger contravenes the Clayton Act." *United States* v. *Marine Bancorporation, Inc.*, 418 U.S. 602, 618, 94 S.Ct. 2856, 2868, 41 L.Ed.2d. 978 (1974) (citations omitted).[3]

[2-4] As was pointed out by the Seventh Circuit Court of Appeals in *Sargent-Welch Scientific Co.* v. *Ventron Corp.*, 567 F.2d 701 (7th Cir. 1977), *cert. denied, 122* U.S. 122, 99 S.Ct. 87, 58 L.Ed.2d 113 (1978),

> [I]n determining what constitutes a relevant market for antitrust purposes, the goal is to "delineate markets which conform to areas of effective competition and to the realities of competitive practice." *L. G. Balfour Co.* v. *FTC*, 442 F.2d 1, 11 (7th Cir. 1971). The "area of effective competition" may be a small submarket supplying specialized products or services. * * * In delineating a relevant submarket, we are to look at
>
> > such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors.
>
> *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 325, 82 S.Ct. 1502, 1524, 8 L.Ed.2d 510 (1962).
>
> The most important of these factors is uniqueness of the product's functions and therefore its uses. If two products are "reasonably interchangeable by consumers for the same purposes" they are considered to be in the same market. . . . We have said on two relatively recent occasions, however, that a market definition "which ignores the buyers and focuses on what the sellers do, or theoretically can do, is not meaningful." *Cass Student Advertising, Inc.* v. *National Educational Advertising Service, Inc. supra*, [7 Cir.] 516 F.2d [1092] at 1095, quoting from *L. G. Balfour Co.* v. *FTC, supra*, 442 F.2d at 11, which in turn quotes from *United States* v. *Bethlehem Steel Corp.*, 168 F.Supp. 576, 592 (S.D.N.Y. 1958).

Id. at 710 (citations omitted).

[5] The definition of a relevant product market is a factual question. *Sulmeyer* v. *Coca-Cola Co.*, 515 F.2d 835, 948 (5th Cir. 1975); also see *Sargent-Welsh Scientific Co.* v. *Ventron Corp.*, 567 F.2d 709. In support of their respective positions on that question, the parties have introduced extensive affidavits and numerous exhibits. In addition, the court held a limited evidentiary hearing, at respondents' request.

After examining all of the proffered evidence, the court has come to the following conclusions concerning the propriety of petitioner's proposed market definition. The FTC has introduced much competent evidence in its favor, including, *inter alia*, evidence of industry and consumer recognition of the existence of a discrete organic pigments market; generic peculiari[4]ies of organic pigments, from the

[3] Both sides agree that the United States is a relevant geographic market.

point of view of their production and use; non-elasticity of price between organic pigments and other colorants, in terms of the end-uses to which they are put. Almost every one of these alleged facts have been contested by respondents' experts. Thus, as it stands at this time, the evidence before the court on the product market definition question amounts to a significant contest between each side's experts.

Although this record might not support injunctive relief under the traditional equitable standard, which demands that a petitioner show a "reasonable likelihood of success on the merits," *Fox Valley Harvestore, Inc.* v. *A.O. Smith Harestore Products, Inc.*, 545 F.2d 1096, 1097 (7th Cir. 1976), it is deemed sufficient to merit the relief requested under section 13(b). Specifically, the court is of the opinion that the FTC has [789] made an adequate showing on the issue of product market definition, as it "has raised questions going to the merits so serious, substantial, difficult, and doubtful as to make them fair ground for thorough investigation, study, deliberation, and determination by the FTC in the first instance and ultimately by the Court of Appeals". *FTC* v. *Lancaster Colony Corp., Inc.*, 434 F.Supp. at 1091, quoted with approval in the Memorandum accompanying the panel decision in *FTC* v. *Beatrice Foods Co.*, 188 U.S.App.D.C. 122, 580 F.2d 701 (1978), approved in *FTC* v. *Beatrice Foods Co.*, No. 78-1260 (D.C. Cir. Sept. 19, 1978)(en banc)(Joint Statement of MacKinnon and Robb, JJ.), 122 U.S.App.D.C. 122 at 122, 122, 122 F.2d 122 at 122, 122.[4] Accordingly, the court must consider the impact of the proposed purchase upon competition within the American organic pigments market.

While the question of market shares within this market has been the subject of sharp disagreement between the parties in this case, the court does not regard the outcome of this quarrel as a significant matter, in terms of its disposition of this petition. Even accepting the figures offered by respondents, this acquisition would fall within the category of suspect transactions under the Department of Justice's

[4] While it subscribes to what it perceives to be the underlying rationale of *Lancaster Colony*, this court does not endorse the "fair and tenable chance of ultimate success" characterization of the "likelihood of success" standard enunciated therein. The phrase "fair and tenable" seems to be less informative than the detailed elaboration of *Lancaster Colony*'s "likelihood of success" standard itself, which this court quotes and follows in the text above. This full articulation of the basis upon which a district court should make its determinations in cases under section 13(b) has the additional virtue of keeping the courts' sights fixed on their primary responsibility in section 13(b) cases, as that was expressed in *Lancaster Colony*:

> The central issue for us is not whether respondents have violated, or are about to violate, the antitrust laws, for adjudication of those issues is vested in FTC in the first instance. * * * Rather, the question for us is whether the FTC has shown prima facie that the public interest requires that a preliminary injunction issue to preserve the status quo until the FTC can perform its adjudicatory function.

434 F.Supp. at 1090 (citations omitted). (This court would not, however, deem the showing required of the FTC to be a "prima facie" showing of where the public interest lies, but something more.).

Merger Guidelines. While the court recognizes that those Guidelines are not binding upon it, upon similar showings, courts have held such statistical evidence to constitute a *prima facie* showing of illegality. *See, e.g., Chemetron Corp.* v. *Crane Co.*, C.C.H. 1977-2 Trade Cases ¶ 61717 (N.D.Ill. 1977).

Respondents seek to rebut this *prima facie* case by alleging that certain specific pro-competitive effects will follow from this acquisition.[5] They assert that it will enable Chemetron and Harmon to better compete with the industry leaders (who would no longer be such in the event that this deal was consummated) by virtue of its synergistic effect on their research and development programs and its better enabling them to finance the construction programs needed to carry out their obligations under the various pollution control laws. However, the basis of the former statement, which was made only by an expert with no actual knowledge of the facts concerning research and development programs in organic pigments industry, was contradicted by respondents' main expert witness, Mr. Saltzman. As for the second claimed pro-competitive effect of this acquisition, even if, despite the substantial size of their parent corporations, Harmon and Chemetron would be better able to obtain necessary funds as a result of this merger, this court cannot say that respondents have made a substantial enough showing on this point to rebut the *prima facie* case established by the FTC's statistics.

If anything, the court considers that the nonstatistical evidence in the record tends rather strongly to support the implications of anticompetitive impact which are found in respondents' suggested market share figures. The testimony is unanimous regarding the barriers to entry in the organic [790] pigments industry. Not one firm has made a successful *de novo* entry in this market in the last twenty years. Bayer attempted it, but even with the expenditure of a not inconsiderable effort, its attempted entry failed. Thus, the increase in the overall concentration in the organic pigments industry wrought by this acquisition would not likely be mitigated by the entry of new firms into the market. Moreover, there is considerable trustworthy evidence before the court that indicates that, if not for this purchase, Harmon and Chemetron had planned on increasing their head-to-head competition in what, for the purposes of this motion, may be described as the various end-use submarkets. Obviously, in addition to the more general anticompetitive effect of this transaction noted above, intra-market competition would also be reduced in this more particular respect.

[5] Respondents do not claim that Harmon or Chemetron is a failing company.

On balance, the court finds that the FTC has made a sufficient showing of its "liklihood of ultimate success" to merit its consideration of the equities in this case.

EQUITIES

Respondents claim that the equities here are in its favor for two principal reasons. First, they point to the fact that ALI has stated, on the record in this court, that it will certainly abandon the proposed sale if a preliminary injunction is issued, thereby injuring the parties and the public, insofar as the latter would forfeit the allegedly pro-competitive effects of the acquisition. Second, they claim that as Harmon and Chemetron have separate production facilities, divestiture would prove a fully adequate remedy, should the FTc conclude, and perhaps a Court of Appeals, as well as (maybe) the Supreme Court, agree, that the purchase was in fact unlawful.

Before addressing itself to these particular claims, the court deems it advisable to reiterate several aspects of its interpretation of the applicable statute. Section 13(b) in part reflects Congress' dissatisfaction with the efficacy of divestiture as a remedy in antitrust cases. To achieve its goal of facilitating successful governmental intervention before the eggs are even cracked, thereby relieving the government from the necessity of trying to unscramble them at some later date, Congress has rendered the traditional equity requirements inapplicable in a section 13(b) suit. In so doing, Congress has commanded the courts to modify, in those cases, their traditional approach to the issuance of preliminary injunctions. It is in this spirit that this court must evaluate respondents' claims.

The court finds respondents' arguments to be unpersuasive. To begin with, the court has received little more than speculation about the existence of the alleged pro-competitive effects. To say the least, respondents' showing on this point has not been compelling. Next, the court must confess that it is not impressed by respondents' claim that these eggs may so easily be unscrambled. After acquiring Harmon, Bayer quickly set up and put to use a network of communications for exhanging various data—technical and marketing data—between it and various of Bayer's European personnel. There is no reason to believe that such transfers of information, possibly including data of the type that many of the companies in this industry have insisted in this court is of the most confidential nature, would not go on between "Harmon" and "Chemetron," were the two companies to be joined via this purchase. Indeed, this is not mere speculation on the part of the court. It is precisely such technical exchanges that, according to Dr. Goodman, would cause this transaction to have "desirable" synergistic effects upon the two firms' research and

development programs. Divestiture would be manifestly ineffective as a means of remedying this possible adverse effect of this transaction, should that prove necessary. In addition, while the parties may now be able to honestly represent to this court that they have no current plans to mesh their production facilities, they may also change their minds about this before the potentially lengthy process of FTC decision making and appellate review had reached a conclusion. In that case, the parties would have to come [791] back before this court and duplicate the proceedings that they have just been through, which would not represent the most efficient use of this court's time and energies, or those of the parties themselves. At the very least, this resolution of the present motion might well "involve the court in constant supervision which it should not undertake." *FTC* v. *Lancaster Colony Corp.*, 434 F.Supp. at 1097.

[6] That leaves the claimed injury to the respondents owing to ALI's announced intention of walking away from the acquisition. The same general phenomenon has been encountered in other cases, and this court endorses the response thereto that was articulated by the court in *Lancaster Colony.* The short of that response is that the equities, and consequently the injuries, to be reckoned in section 13(b) cases are not private ones, but public ones. As Judge Winter noted in *Food Town Stores,*

> All of these reasons go to the *private* injury which may result from an injunction delaying the merger. I do not minimize them, but I conclude that they are of such a nature that they are not proper considerations for granting or withholding injunctive relief under § 13(b). My conclusion in this respect is reinforced by recognition that many of them would result if any merger is enjoined on the eve of its consummation; yet Congress enacted § 13(b) authorizing injunctive relief, thereby indicating that it thought that little weight should be given to them.

539 F.2d at 1346.[6] The court agrees with the judgment of Judge MacMahon in *Lancaster Colony* that this conclusion is particularly appropriate where, as in that case and this case, the alleged private injury is caused by the parties' own decision to, in effect, cancel the deal in the event that an injunction be issued.

[7] As against these equities on respondents' side, there are substantial equities on the side of the FTC. "Suffice it to say that if the aim of the Clayton Act to nip anticompetitive acquisitions in the bud is to be implemented, injunctions prohibiting these acquisitions serve the public interest." *FTC* v. *Lancaster Colony,* 434 F.Supp. at 1096. In light of what it perceives to be the intent of the Congress in enacting section 13(b), this court believes that, where, as here, a sufficient showing of a likelihood of success has been made by the FTC, a

[6] As a result of Judge Winter's decision in *Food Town Stores,* the merger in that case was abandoned. *FTC* v. *Food Town Stores, Inc.*, 547 F.2d 247 (4th Cir. 1977).

great weight is to be assigned to both the potential injury to the public stemming from the loss of actual competition between the acquiring and the acquired company pending the ultimate resolution of the fate of the FTC's complaint and the lingering injury caused thereby, as well as to the potential injury to the public caused by the acknowledged shortcomings of the remedy of divestiture.

Therefore, even if the private injury to respondents be taken into account, the court considers the balance of the equities to lie markedly on the side of the FTC.

Public Interest

[8] As the FTC has both made an adequate showing as to its "likelihood of ultimate success" and established that the equities in this case favor its position, the court concludes that the entry of an injunction during the pendency of the administrative proceedings and any subsequent judicial review would be in the public interest.

Conclusion

Accordingly, the FTC's application for the issuance of an injunction during the pendency of the administrative proceedings and any subsequent judicial review is granted.

It is so ordered.

UNITED STATES v. O.K. TIRE & RUBBER CO.*

Civ. No. 1-74-152. F.T.C. Docket No. 8571.

(United States District Court, District of Idaho, October 25, 1978)

In denying Government's motion for Court review or reconsideration of allowances of costs as so taxed by Clerk, court held that litigation costs, including expenses incurred for depositions not utilized at the trial, were properly awarded to prevailing defendant in a dismissed civil penalties action charging tire manufacturer with violating an F.T.C. consent order. Although expenses for unused depositions were usually excluded from allowable costs, plaintiff had failed to raise timely objections specifying such sums and Clerk properly allowed the Cost Bill as presented. Court rejected "odd" argument that it should have exercised its discretion and disallowed costs because of Government's good faith prosecution of case.

Before McNICHOLS, *Chief Judge.*

ORDER DENYING MOTION TO RECONSIDER TAXING OF COSTS

This case came on for trial on September 25, 1978, as a Bench Trial. At the close of evidence on behalf of the plaintiff, the Motion to Dismiss under Rule 41(b), Federal Rules of Civil Procedure, was granted in favor of the defendant.

Findings of Fact and Conclusions of Law were made and a formal Order of Dismissal entered. Costs were specifically allowed to the defendant.

Defendant duly filed its Notice to Tax Costs in accordance with Rule 55, Federal Rules of Civil Procedure, and Rule 19, Local Rules—Civil, of this Court. No timely objection was made by the plaintiff to any item of cost, and the Clerk taxed costs in the amount of $7,975.87.

Plaintiff now seeks a Court review or reconsideration of the allowance of costs as so taxed by the Clerk. The principal thrust of plaintiff's objection is that no costs should be taxed against the plaintiff.

It is conceded that Rule 54(d) provides for the allowance of costs to the prevailing party as a matter of course. Likewise it is acknowledged that the provisions of 28 U.S.C. § 2412 bring the United States, when a party to the litigation, within the provisions of Rule 54(d). However, plaintiff urges that the Government prosecuted this case in good faith and therefore the Court should exercise its discretion, as permitted by Rule 54(d), to disallow costs. This is an odd argument, as most cases are brought in good faith and defended in

*Not reported in Federal Reporter. Reported in Trade Reg. Rep. ¶ 62,331 at 75,973 (1978-2 Trade Cases). For case before the Commission, see *In the Matter of O.K. Rubber Welders, Inc., et al.*, 65 F.T.C. 1091.

good faith, yet the rule contemplates that the prevailing party is allowed its costs unless there be some compelling showing why the general practice be not followed. Costs are not considered to be a penalty or punishment, but are intended to reimburse the prevailing party for expenses reasonably and necessarily incurred.

I find that the record in this case is barren of any persuasive reason for deviation from the usual rule of allowing costs to the prevailing party.

Depositions

Plaintiff also objects to the allowance as costs of the expenses incurred in discovery procedures by way of deposition transcripts. These items make up the major portion of defendant's Cost Bill ($7,210.87 out of a total of $7,975.87). It has been the practice in this court to exclude from allowable costs the expenses incurred for depositions not utilized at the trial. Had a specific objection been raised detailing the cost of depositions not so used at the trial, the Clerk would have eliminated those items under local procedures. No timely objections were raised, and the Clerk properly allowed the Cost Bill as presented.

It follows that plaintiff has failed to make an adequate showing for a review or reconsideration of the costs as taxed by the Clerk.

IT IS THEREFORE ORDERED:

That plaintiff's Motion for Reconsideration of Costs as Taxed is Denied. The Cost Bill as taxed by the Clerk of this Court is affirmed and made an order of the Court.

AMOLSCH & MADDEN, INC., d/b/a/ FTC: WATCH *v.* FEDERAL TRADE COMMISSION*

No. 78-1699. F.T.C. File No. 99-375.

(United States Court of Appeals, District of Columbia Circuit, October 31, 1978)

1. DISCLOSURE OF COMPLIANCE REPORT LISTING FORMER VOCATIONAL SCHOOL STUDENTS TO RECEIVE TUITION REFUNDS UNDER PROVISIONS OF CONSENT ORDER WOULD BE DENIED, SINCE IT WOULD INTERFERE WITH PROSPECTIVE LAW ENFORCEMENT PROCEEDINGS.

   Where disclosure of compliance report delineating former students of vocational school who would be paid tuition refunds under terms of consent order would interfere with prospective law enforcement proceedings, such disclosure would be denied.

Action was brought under the Freedom of Information Act to compel disclosure of a compliance report, incorporated in a consent order, which delineated former students to whom a vocational school would be required to pay tuition refunds. The United States District Court for the District of Columbia, John Lewis Smith, Jr., J., denied disclosure, and plaintiffs appealed. The Court of Appeals held that the trial court's conclusion was correct.

Affirmed.

(Syllabus, with substituted captions, taken from 591 F.2d 809)

Before WRIGHT, *Chief Judge,* and TAMM and LEVENTHAL, *Circuit Judges.* [810]

JUDGMENT

PER CURIAM.

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia and was argued by counsel. While the issues presented occasion no need for an opinion, they have been accorded full consideration by the court. *See* Local Rule 13(c).

This court finds itself in agreement with the result reached by the District Court for the reasons stated in its opinion dated June 30, 1978.

On consideration of the foregoing, it is ORDERED and ADJUDGED by this court that the judgment of the District Court appealed from in this cause is hereby affirmed.

*Reported in 591 F.2d 809 (1978).

APPENDIX

AMOLSCH & MADDEN, INC., d/b/a FTC: WATCH, Plaintiff,

v.

FEDERAL TRADE COMMISSION et al., Defendants.

Civ. A. No. 77-1553.

United States District Court, District of Columbia. June 30, 1978.

OPINION

JOHN LEWIS SMITH, JR., *District Judge.*

Plaintiff brought this action under the Freedom of Information Act (hereinafter "Act"), 5 U.S.C. § 522, to compel disclosure of one document, a compliance report, incorporated in a consent order, which delineates those former students to whom the vocational school subject to that order must pay tuition refunds. Defendants have invoked the seventh exemption of the Act, 5 U.S.C. § 552(b)(7), contending that the document is an investigatory document, release of which would interfere with enforcement proceedings. This case is before the Court on Cross-motions for Summary Judgment.

In June, 1971, the government commenced an investigation into a Ryder subsidiary, Ryder Schools, which offered vocational training to would-be truck drivers and heavy equipment operators. The investigation concerned the truthfulness of representations by Ryder Schools concerning the prospects for placement of its graduates in jobs for which they were to be trained.

After investigation and prior to the issuance of a formal adjudicative complaint by the Commission, Ryder tentatively agreed to an outline of the settlement that would provide partial refunds to former students, up to the total redress amount of $1.5 million. During the negotiations it became evident that standards would be useful in determining which former students would be eligible for restitution. Such standards were negotiated, but Ryder and the Federal Trade Commission (hereinafter "FTC") staff felt that these standards should be kept confidential until questionnaires being sent to former students were returned so that students who were aware of the standards could not tailor their responses to ensure that they would receive a refund.

To provide this confidentiality the supervising government attorney suggested that instead of placing the standards in the agreement itself, they be embodied in a compliance report, which under the Commission's Rules of Practice, 16 C.F.R. § 2.33, may be accorded confidential treatment for the Report. The FTC provisionally accepted the consent agreement on or about January 18, 1977. The consent agreement was placed on public record for comment for 60 days. After reviewing the consent agreement in light of the comments received, the Commission gave final approval to the agreement on December 28, 1977.

Plaintiff filed a Freedom of Information Act request for the withheld initial compliance report. The request was denied, and an appeal to the Commission resulted in a similar denial. As ground for its denial, the FTC relied on the exemption contained in Section 552(b)(7)(A) of the Act relating to [811] investigatory records compiled for law enforcement purposes, production of which would interfere with enforcement proceedings.

The present action followed. Here plaintiff contends that the compliance report is part of the order and must be disclosed; that the compliance report is not "investigatory"; and that it would not interfere with enforcement proceedings.

An agency, seeking the protective shelter of a statutory exemption to justify its refusal to disclose records, has the burden of proving that the document involved falls within the exemption. *Getman* v. *NLRB,* 146 U.S.App.D.C. 209, 212-213, 450 F.2d 670, 673-674 (1971). The Freedom of Information Act reflects a public policy of favoring citizen access to government records. "The legislative plan creates a liberal disclosure requirement, limited only by specific exemptions which are to be narrowly construed." *Bristol-Myers Co.* v. *FTC,* 138 U.S. App.D.C. 22, 25, 424 F.2d 935, 938, *cert. denied,* 400 U.S. 824, 91 S.Ct. 46, 27 L.Ed.2d 52 (1970). *Accord, Ditlow* v. *Shultz,* 170 U.S.App.D.C. 352, 355, 517 F.2d 166, 169 (1975); *Getman* v. *NLRB,* 146 U.S.App.D.C. 209, 450 F.2d 670 (1971).

Plaintiffs contend that defendants have not carried this burden, citing *United States* v. *Trucking Employers, Inc.,* 39 Ad.L.2d (P&F) 694 (D.D.C.1976), for the proposition that compliance reports do not qualify as "investigatory records". In that case, Chief Judge Bryant of this Court stated:

> Finally, the companies argue that exemption (b)(7) applies here, in that the material constitutes investigatory files compiled for law enforcement purposes. The leading cases in this circuit make clear that these files cannot be characterized as either investigatory or compiled for law enforcement purposes, since they are *subsequent* to an adjudication and are used solely to monitor compliance with the consent decree in this case, not to evaluate compliance with federal law with a possible statutory enforcement action resulting. *Id.* at 698 (emphasis in original).

The rules of the FTC provide for two types of documents that are "compliance reports." The compliance report at issue here is an initial report, defined at 16 C.F.R. § 2.33 as "setting forth in precise detail the manner in which the respondent *will* comply with the order *when and if* entered". (emphasis added). The more traditional form of compliance report indicates how the respondent has complied with an order and is found under the section relating to adjudications, 16 C.F.R. § 3.61. It is this second type of FTC compliance report which is involved in the *Trucking Employers* case.

The difference between this case and *Trucking Employers* is the difference between the past and the future. In *Trucking Employers* the compliance reports followed and related to a completed adjudication. In the instant action, the compliance report reflects the results of a lengthy FTC investigation of hiring practices in trucking and heavy equipment operation, and looks to a future adjudication of refund claims to be submitted by Ryder graduates.

This adjudicatory process consists of several steps. On June 14, 1978 Ryder's independent contractor mailed the affidavit questionnaires to certain Ryder graduates, pursuant to Paragraph 4 of Part III of the order. The completed questionnaires and clarifying information will be returned by November 6, 1978, pursuant to Paragraph 10(e) of Part III of the order. Then the refund claims will be adjudicated by the FTC and Ryder, and in the event of disagreement, by arbitrators pursuant to the rules of the American Arbitration Association. The compliance report will be used in this adjudicatory process to determine refund eligibility.

Since the publication of the compliance report at this time would interfere with prospective law enforcement proceedings, this case is clearly different from *Trucking Employers*. It is evident the compliance report in question should be given (b)(7)(A) protection for the limited period of time requested. The compliance report in this case will be made public on November 7, 1978, one day after the November 6 dead[812]line for the submission of the affidavit questionnaires and clarifying information.

Accordingly, defendant's motion for summary judgment is granted and plaintiff's motion for summary judgment is denied.

UNITED STATES v. R.J. REYNOLDS TOBACCO CO.*

No. 76 Civ. 813 (JMC). F.T.C. Docket No. C-2184.

(United States District Court, Southern District of New York, October 31, 1978)

In a civil penalties action charging a cigarette manufacturer with violating an FTC consent order requiring that health warnings be displayed in advertising, court denied respondent's motion for discovery of FTC documents alleged to contain Commission interpretations of the consent order, holding that defendant had failed to make the threshold showing of relevancy. However, discovery request could be renewed if it appeared that court had to go beyond the four corners of the consent order to determine whether its provisions had been breached.

Richard E. Nolan, of *Davis Polk & Wardwell,* New York, N.Y., *John F. Kovin,* of *Clifford, Warnke, Glass, McIlwain & Finney,* Washington, D.C., for defendant.

Robert B. Fiske, Jr., U.S. Atty., *Richard J. Weisberg,* Asst. U.S. Atty., New York, N.Y., *Terrence J. Boyle,* FTC, Washington, D.C., for plaintiff.

Before CANNELLA, *District Judge.*

MEMORANDUM DECISION

The April 1, 1977, Report of United States Magistrate Harold J. Raby is adopted by the Court.

The above-entitled matter, and several related cases consolidated before the Court, involved a consent order that prescribes the format of the warning statement concerning the dangers of cigarette smoking, which must be included on all printed advertising disseminated by cigarette manufacturers. These lawsuits have been pending for more than three years; yet discovery controversies persist. Magistrate Raby ruled on discovery motions twice; on December 28, 1976, and on April 1, 1977. Thereupon defendant filed voluminous objections[1] to the Magistrate's report with the Court.

At a pretrial conference held October 25, 1978, defendant advised the Court that its principal objection is that the Magistrate refused to order the Government to produce certain internal memoranda of the Federal Trade Commission. These memoranda allegedly contain

*Not reported in Federal Reporter. Reported in Trade Reg. Rep. ¶ 62,368 at 76,186 (1978-2 Trade Cases). For case before the Commission, see 80 F.T.C. 455.

[1]In connection with its discovery motion, defendant filed five briefs containing a total of two-hundred and forty-three pages of argument. In this regard, counsel are reminded that "[t]he signature of an attorney constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information and belief there is good ground to support it; and that it is not interposed for delay." Fed. R. Civ. P. 11.

interpretations of the consent order, by Commissioners and staff members, that are inconsistent with the Government's position in this litigation. Defendant claims that it shall show at trial that it has complied with the consent order in "good faith" and that the documents it seeks will support this position. The Government opposes production of these documents claiming that they are both privileged and irrelevant. At this stage of the litigation, the Court finds that the defendant has failed to make the threshold showing of relevancy and, accordingly, declines to order the production of these documents.

At the pretrial conference the parties were advised that the Court would bifurcate this trial. The only issue in the liability trial is the meaning of the consent order. In the event that the Court is persuaded at trial that it need go beyond the four corners of the consent order (which was negotiated between the parties over a seven-month period) to determine whether its provisions have been breached, defendant will be permitted to renew its application at that time.

The Court has considered the other objections to the Magistrate's report, and finds them to be without merit. The Court approves the April 1, 1977, Report of Magistrate Raby and adopts the recommendation contained therein as the Court's ruling.

As announced at the pretrial conference, the Court will deem this case and all consolidated cases ready for the trial of the liability issues on December 16, 1978.

So ordered.

MICHAEL N. MERVIN *v.* FEDERAL TRADE COMMISSION*

No. 77-1204. F.T.C. File No. 99-310.

(United States Court of Appeals, District of Columbia Circuit, November 2, 1978)

1. ATTORNEY WORK PRODUCT PRIVILEGE IS SUBSUMED IN FOIA EXEMPTION FOR INTERAGENCY AND INTRA-AGENCY MEMORANDA OR LETTERS WHICH WOULD NOT BE AVAILABLE BY LAW TO A PARTY OTHER THAN AN AGENCY IN LITIGATION WITH AGENCY.

   [822] Exemption from disclosure provided under Freedom of Information Act for interagency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with agency subsumes attorney work product privilege.

2. MENTAL IMPRESSIONS, CONCLUSIONS, OPINIONS, OR LEGAL THEORIES OF AN ATTORNEY OR OTHER REPRESENTATIVE OF A PARTY CONCERNING LITIGATION ARE PROTECTED FROM DISCLOSURE BY ATTORNEY WORK PRODUCT PRIVILEGE.

   Attorney work product privilege protects against disclosure of mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning litigation.

3. MERELY INCLUDING TEXT OF A VERBATIM WITNESS STATEMENT IN A MEMORANDUM PREPARED BY GOVERNMENT ATTORNEY FOR USE IN LITIGATION DOES NOT PROTECT IT FROM DISCLOSURE, EITHER IN CIVIL DISCOVERY OR UNDER FOIA.

   A government attorney may not protect a verbatim witness statement from disclosure, either under the Freedom of Information Act or in civil discovery, merely by including its text in a memorandum prepared for use in litigation.

4. WITNESS STATEMENTS, SUCH AS THOSE TAKEN BY AN EMPLOYER'S ATTORNEY FROM EMPLOYEES IN COURSE OF THEIR DUTIES, UNDER PROMISE OF CONFIDENTIALITY, MAY SOMETIMES BE PRIVILEGED AS ATTORNEY WORK PRODUCT.

   Witness statements may sometimes be privileged as attorney work product, as for example, statements taken by attorney for an employer from its employees in course of their duties, under a promise of confidentiality.

5. SINCE STATEMENTS OF FACT CONCERNING PLAINTIFF'S DISMISSAL FROM FTC WERE CONTAINED IN MEMORANDA PROTECTED FROM DISCLOSURE BY ATTORNEY WORK PRODUCT PRIVILEGE, PLAINTIFF WAS NOT ENTITLED TO THEIR DISCLOSURE.

   Plaintiff was not entitled to disclosure of statements of fact concerning his dismissal as an attorney for the Federal Trade Commission, which were contained in memoranda prepared by government attorney which were exempt from disclosure under the Freedom of Information Act under attorney work product privilege.

6. ANY MATERIAL, INCLUDING STATEMENTS OF FACT, WHOSE SEGREGATION MIGHT REVEAL AN ATTORNEY'S TACTICAL AND STRATEGIC THOUGHTS, ARE PROTECTED FROM DISCLOSURE BY ATTORNEY WORK PRODUCT PRIVILEGE.

   An important part of what is protected by privilege for attorney work product is attorney's consideration and weighing of facts, and because of this,

* Reported in 591 F.2d 821 (1978). *Rehearing Denied*, December 4, 1978.

even factual material segregated from attorney work product is likely to reveal some of attorney's tactical and strategic thoughts; accordingly, while government cannot exempt pure statements of fact from disclosure under Freedom of Information Act by calling them attorney work product, material which might disclose an attorney's appraisal of factual evidence is attorney work product exempted from disclosure.

7. ALTHOUGH SUCH INSPECTION IS NOT NECESSARY IN ALL CASES, COURT SHOULD ORDINARILY CONSIDER THE POSSIBILITY OF AN IN CAMERA EXAMINATION OF DOCUMENTS CLAIMED TO BE PRIVILEGED ATTORNEY WORK PRODUCT TO INSURE THAT THEY CONTAIN NO SEGREGABLE FACTUAL PORTIONS AND THAT EXEMPTION IS PROPERLY APPLIED.

[823] Courts should ordinarily consider possibility of examining documents in camera to determine whether material claimed to be exempt from disclosure under Freedom of Information Act as attorney work product contains segregable factual portions, and, in some cases, it may be the only way to insure that exemption is properly applied; however, in camera inspection will not be necessary in all cases.

8. WHERE GOVERNMENT ATTORNEY'S AFFIDAVIT SATISFIED COURT THAT TO EXTENT DOCUMENTS HELD TO BE ATTORNEY WORK PRODUCT CONTAINED FACTUAL DATA, SUCH DATA WERE BOUND UP WITH DISCUSSION OF STRATEGY AND DELIBERATIVE PROCESSES OF ATTORNEYS PREPARING DEFENSE FOR PENDING LAWSUIT, AND THUS "PRIVILEGED," AN IN CAMERA EXAMINATION AS TO THEIR SEGREGABILITY WAS UNNECESSARY.

No in camera inspection was required to determine whether documents claimed to be exempt from disclosure under Freedom of Information Act as attorney work product contained segregable factual portions, where affidavit of government attorney satisfied court that to extent documents contained factual material, it was incidental to and bound up with discussion of litigation strategy and deliberative processes of attorneys actively preparing their defense for a pending lawsuit and thus established that "factual" material was actually privileged attorney work product.

9. EVEN WHEN FACTUAL MATERIAL IS NOT OTHERWISE AVAILABLE TO REQUESTOR, FOIA MAY PROTECT SUCH DATA FROM DISCLOSURE AS PART OF ATTORNEY WORK PRODUCT, IN LIGHT OF STRONG PUBLIC POLICIES FURTHERED BY ATTORNEY WORK PRODUCT PRIVILEGE.

In view of strong public policies furthered by privilege for attorney work product, factual material may be protected from disclosure under Freedom of Information Act as part of attorney work product even though it is not reasonably available to requestor from another source.

10. ORDINARY RULE IMPOSING BURDEN OF PROOF ON PLAINTIFF WOULD APPLY SINCE PRIVACY ACT ALLOCATED NO BURDEN OF PROOF WITH RESPECT TO REQUEST TO AMEND ALLEGEDLY INACCURATE RECORDS AND LEGISLATIVE HISTORY AND REPORTED DECISIONS SHED NO LIGHT ON THE QUESTION.

Privacy Act having contained no provision allocating burden of proof with respect to request to amend allegedly inaccurate records, and legislative history and reported decisions having shed no light on question, ordinary rule enforcing burden of proof on plaintiff would apply.

11. DISMISSED FTC ATTORNEY FAILED TO MEET HIS BURDEN OF PROOF IN SEEKING TO HAVE FTC AMEND ITS RECORDS REGARDING HIS DISMISSAL BY REMOVING REFERENCES THAT HE WAS DISCHARGED FOR INEFFICIENCY.

Plaintiff, who sought to have Federal Trade Commission amend its records concerning his dismissal as an attorney for FTC to remove references that he was dismissed for inefficiency, failed to meet his burden of proof on that issue.

12. UNDER DUE PROCESS CLAUSE, PLAINTIFF WOULD HAVE A CAUSE OF ACTION FOR INFRINGEMENT OF HIS LIBERTY IF CIRCUMSTANCES OF HIS DISMISSAL EFFECTIVELY FORECLOSED OPPORTUNITIES TO OBTAIN FUTURE EMPLOYMENT IN HIS PROFESSION, BUT HE HAD NO PROPERTY RIGHT TO CONTINUED EMPLOYMENT SINCE HE HAD NO CIVIL SERVICE APPOINTMENT AND SERVED AT PLEASURE OF HIS SUPERIORS.

Since plaintiff, who was discharged from his position as an attorney for Federal Trade Commission, did not have a civil service appointment and served at pleasure of his superiors, he had no property right to continued employment cognizable under due process clause; however, he would have a cause of action for infringement of his liberty if circumstances of his dismissal were such as would effectively foreclose his opportunities to obtain future employment in his profession.

13. COURTS DO NOT SIT AS GENERAL PUBLIC EMPLOYEE GRIEVANCE REVIEW BOARDS.

Courts do not sit as general public employee grievance review boards.

14. DISMISSAL FROM EMPLOYMENT IS NOT IN ITSELF A DUE PROCESS VIOLATION.

Dismissal from employment, without more, might make search for a new job difficult, but this in itself is not a due process violation.

15. THAT FTC OFFICIALS COMMUNICATED TO PROSPECTIVE EMPLOYERS THEIR BELIEF THAT PLAINTIFF DID NOT ADEQUATELY AND EFFICIENTLY PERFORM HIS FTC DUTIES DID NOT CONSTITUTE AN INFRINGEMENT OF HIS LIBERTY INTEREST.

Liberty interest of plaintiff, who was discharged from his position as an attorney for Federal Trade Commission, was not infringed by FTC, whose officials communicated to plaintiff's prospective employers their belief that he did not adequately and efficiently perform his duties at FTC.

16. FTC HAS AN OBLIGATION TO FOLLOW ITS PROCEDURAL RULES IN SPIRIT AS WELL AS LETTER, AND CANNOT DENY EMPLOYEE SAFEGUARDS REQUIRED FOR "UNSATISFACTORY" RATING MERELY BY DISCHARGING HIM FOR A REASON THAT IS AN "UNSATISFACTORY" RATING IN ALL BUT NAME.

An agency cannot be permitted to exalt form over substance and deny an employee procedural safeguards required for an "unsatisfactory" rating merely by discharging him for a reason that is, in everything but name, an "unsatisfactory" rating; agency's obligation to follow its own procedural rules is an obligation to follow their spirit as well as their letter.

17. ALTHOUGH JUDICIAL REVIEW WAS NOT APPROPRIATE WHERE PLAINTIFF HAD NEVER PURSUED ADMINISTRATIVE REMEDIES REGARDING HIS CLAIM OF ALLEGEDLY IMPROPER DISMISSAL PROCEDURES, DISPOSITION WAS WITHOUT PREJUDICE TO SEEK SUCH REMEDIES AND SUBSEQUENT JUDICIAL REVIEW.

[824] Where plaintiff never attempted to pursue his administrative remedies with respect to his claim that reason communicated to Civil Service Commis-

sion and to prospective employers for his discharge as an attorney for the Federal Trade Commission was tantamount to an "unsatisfactory" rating but that he was not afforded procedures applicable to persons given unsatisfactory ratings, judicial review was not appropriate; however, this disposition was without prejudice to attempt to pursue administrative remedies and seek judicial review thereafter, subject to whatever barriers might be presented by statute of limitations.

18. RELITIGATION ON GROUNDS OR THEORIES ADVANCED OR WHICH COULD HAVE BEEN ADVANCED IN PRIOR LITIGATION IS BARRED BY PRINCIPLES OF *RES JUDICATA*.

Principles of res judicata prevent relitigation not only on grounds or theories actually advanced, but also on those which could have been advanced in prior litigation.

19. WHERE PLAINTIFF HAD PURSUED HIS PRESENT CAUSE OF ACTION (SEEKING REINSTATEMENT BECAUSE OF ALLEGEDLY IMPROPER DISMISSAL PROCEDURES) IN PREVIOUS LITIGATION, THE FACT THAT INSTANT DEFENDANT WAS FTC AND CSC HAD BEEN THE DEFENDANT IN ONE OF THE PRIOR SUITS DID NOT PREVENT APPLICATION OF THE PRINCIPLE OF *RES JUDICATA* TO JUDGMENT IN THAT CASE.

Where plaintiff, who was discharged from his employment as an attorney for the Federal Trade Commission, proceeded in an attempted administrative appeal and two prior civil suits on theory that he was discharged as part of a reduction in force, citing civil service regulation, he was pursuing in those suits the same cause of action as in his instant suit against FTC, in which he cited similar provision in FTC administrative manual, i.e., seeking reinstatement because of allegedly improper dismissal procedures, and fact that present defendant was FTC, while defendant in one of prior cases was the CSC, did not prevent application of principle of res judicata to judgment in that case.

20. JUDGMENT IN A SUIT BETWEEN A PARTY AND A REPRESENTIVE OF GOVERNMENT IS *RES JUDICATA* IN RELITIGATION OF SAME ISSUE BY THAT PARTY AND ANOTHER GOVERNMENT OFFICER, BECAUSE OF PRIVITY BETWEEN OFFICERS OF SAME GOVERNMENT.

There is privity between officers of same government so that a judgment in a suit between a party and a representative of the United States is res judicata in relitigation of same issue between that party and another officer of government.

21. DISMISSAL OF PLAINTIFF'S PRIOR SUIT AGAINST CSC FOR FAILURE TO STATE A CLAIM WITHIN CSC'S POWER TO GIVE HAD FULL *RES JUDICATA* EFFECT ON HIS SUBSEQUENT SUIT AGAINST FTC FOR REINSTATEMENT AND DAMAGES.

Dismissal of plaintiff's prior suit against Civil Service Commission, following discharge from his employment as attorney for the Federal Trade Commission, for failure to state a claim, plaintiff having sought relief which was beyond power of the CSC to give, was an adjudication on merits having full res judicata effect with respect to his subsequent suit against the Federal Trade Commission for reinstatement and damages.

Plaintiff, who was discharged from his employment as an attorney for the Federal Trade Commission, brought action against the FTC, seeking disclosure of documents under the Freedom of Information Act, amendment of FTC's records under Privacy Act of 1974, and reinstatement and damages. On cross motions for summary judgment, the United States District Court for the District of Columbia granted summary

judgment, the United States District Court for the District of Columbia granted summary judgment to the FTC on all three counts, and plaintiff appealed. The Court of Appeals held that: (1) memoranda prepared by government attorney while the Federal Trade Commission was defending against plaintiff's earlier suit for reinstatement was exempt from disclosure under Freedom of Information Act as attorney work product, and severance of factual material concerning dismissal contained in memoranda would have been inappropriate; (2) plaintiff, in seeking to have FTC amend its records to remove references that he was dismissed for inefficiency, failed to meet burden of proof on that issue; (3) since plaintiff did not have a civil service appointment and served at pleasure of his superiors, he had no property right to continued employment cognizable under due process clause; (4) where plaintiff never attempted to pursue administrative remedies with respect to his claim that reason given for his discharge to the Civil Service Commission and to prospective employers was tantamount to an "unsatisfactory" rating, but he was not afforded procedures for imposition of such a rating, judicial review was not appropriate at this point, and (5) dismissal of plaintiff's prior suit against the Civil Service Commission was an adjudication on merits having full res judicata effect with respect to instant suit.

Affirmed.

(Syllabus, with substituted captions, taken from 591 F.2d 821)

BAZELON, *Circuit Judge,* concurred in part and dissented in part and filed opinion.

Appeal from the United States District Court for the District of Columbia (D.C.Civil 76-0686).

Michael N. Mervin, pro se.

Jonathan Lash, Asst. U.S. Atty., Washington, D.C., with whom *Earl J. Silber,* U.S. Atty., *John A. Terry, William D. Pease* and *Michael J. Ryan,* Asst. U.S. Attys., Washington, D.C., were on the brief, for appellee.

Before BAZELON, MCGOWAN and MACKINNON, *Circuit Judges.*

Opinion for the court PER CURIAM.

Opinion filed by Circuit Judge BAZELON, concurring in part and dissenting in part.

PER CURIAM:

Plaintiff-appellant Michael N. Mervin was employed by the Federal Trade Commission (FTC) as an attorney until he was discharged early in 1971. After pursuing a variety of other administrative and judicial proceedings, he brought this action in 1976 against the FTC. He presents three separate claims: (1) for disclosure of documents under the Freedom of Information Act (FOIA); (2) for amendment of the FTC's records relating to him, under the Privacy Act of 1974; and (3) for reinstatement and damages on the basis that his dismissal was wrongful. On cross-motions for summary judgment, the District Court granted summary judgment to the FTC on all three counts. We affirm. [825]

A

Under the FOIA, 5 U.S.C. § 552, Mervin seeks disclosure of four memoranda prepared by government attorneys while the FTC was defending against an earlier suit for reinstatement brought by Mervin. That suit was dismissed for failure to exhaust administrative remedies.

[1, 2] The FTC submitted an affidavit by one of its attorneys, W. Randolph Smith (Brief for Appellee, App. at 42-44), generally describing the four memoranda and claiming that they are exempt from disclosure under exemption 5 of the FOIA, 5 U.S.C. § 552(b)(5). Exemption 5 provides that government agencies need not disclose "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." The Supreme Court has said that the civil discovery rules "can only be applied under Exemption 5 by way of rough analogies." *EPA* v. *Mink*, 410 U.S. 73, 86, 93 S.Ct. 827, 835, 35 L.Ed.2d 119 (1973). Nevertheless, it is clear that exemption 5 subsumes the attorney work product privilege. *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 154, 95 S.Ct. 1504, 44 L.Ed.2d 29 (1975). As characterized in Fed.R.Civ.P. 26(b)(3), the attorney work product privilege protects "against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation."

[3, 4] Mervin's position appears to be that, although parts of the memoranda may be attorney work product exempt from disclosure, he is entitled to disclosure of those portions of the memoranda which contain statements of fact concerning his dismissal. Subsection (b) of the FOIA provides in part that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." 5 U.S.C. § 552(b). For example, a government attorney may not protect a verbatim witness statement from disclosure (either under the FOIA or in civil discovery) merely by including its text in a memorandum prepared for use in litigation. *Robbins Tire & Rubber Co.* v. *NLRB*, 563 F.2d 724, 735-37 (5th Cir. 1977), *rev'd on other grounds*, 437 U.S. 214, 98 S.Ct. 2311, 57 L.Ed.2d 159 (1978); *see Bristol-Myers Co.* v. *FTC*, 138 U.S.App.D.C. 22, 26, 424 F.2d 935, 939, *cert. denied*, 400 U.S. 824, 91 S.Ct. 46, 27 L.Ed.2d 52 (1970) (governmental deliberative privilege).[1]

[1] Even witness statements may sometimes be privileged as attorney work product, for example, statements taken by the attorney for an employer from its employees in the course of their duties, under a promise of confidentiality. *See Brockway* v. *Department of the Air Force*, 518 F.2d 1184, 1189-94 (8th Cir. 1975) (FOIA exemption 5); *Machin* v. *Zuckert*, 114 U.S. App. D.C. 335, 316 F.2d 336, *cert denied*, 375 U.S. 896 (1963) (civil discovery).

[5]We agree with the District Court and with the government that it would not be appropriate to sever factual material out of the memoranda at issue here. We recently said, in *Mead Data Central, Inc.* v. *United States Dep't of Air Force*, 184 U.S. App.D.C. 350, 566 F.2d 242, 256 (1977), that:

> Exemption five is intended to protect the deliberative process of government and not just deliberative material. . . In some circumstances . . . the disclosure of even purely factual material may so expose the deliberative process within an agency that it must be deemed exempted by section 552(b)(5).

For example, in *Montrose Chemical Corp.* v. *Train*, 160 U.S.App.D.C. 270, 274-78, 491 F.2d 63, 67-71 (1974), we held certain summaries of evidence in an administrative hearing to be non-severable. The summaries had been prepared by the government officers who had heard the evidence, to assist the agency head who was charged with making a decision based on that evidence. To disclose the factual portions of these documents, we noted, would disclose which facts the administrator's aides considered important enough to bring to his attention, thereby exposing part of the deliberative process in a way contrary to the intent of exemption 5 that government officials be able to communicate among them[826]selves in candor concerning decisions not yet made. *Accord, Brockway, supra.*

Montrose Chemical and *Mead Data, supra*, illustrate that in cases concerning the governmental deliberative process the distinction between "factual" and "deliberative" material does not answer all exemption 5 questions. This case concerns the attorney work-product privilege. We believe that a strict demarcation between factual and deliberative material (requiring disclosure of the former) is even less helpful here than it is in cases involving the governmental deliberative process.

[6] An important part of what is protected by the privilege for attorney work-product is the attorney's consideration and weighing of the facts. *Hickman* v. *Taylor*, 329 U.S. 495, 511, 67 S.Ct. 385, 91 L.Ed. 451 (1947); *Kent Corp.* v. *NLRB*, 530 F.2d 612, 624 (5th Cir.), *cert. denied*, 429 U.S. 920, 97 S.Ct. 316, 50 L.Ed.2d 287 (1976) (FOIA exemption 5). Because of this, even the factual material segregated from attorney work-product is likely to reveal some of the attorney's tactical and strategic thoughts. While the government cannot exempt pure statements of fact from disclosure by calling them at torney work-product, we agree with the Fourth and Fifth Circuits that material which might disclose an attorney's appraisal of factual evidence is attorney work-product exempted from disclosure by exemption 5. *Kent Corp.* v. *NLRB, supra, Deering Milliken, Inc.* v. *Irv-*

ing, 548 F.2d 1131, 1137-38 (4th Cir. 1977). *Cf. Robbins Tire, supra*, in which the Fifth Circuit distinguished *Kent Corp.* and held that certain witness statements were not within exemption 5.

[7, 8] The dissent suggests that the case should be remanded to the District Court for either further government affidavits or an *in camera* inspection of the documents. We disagree. Courts should ordinarily consider the possibility of examining the document *in camera* to determine whether the material claimed to be exempt as attorney work-product contains segregable factual portions. In some cases it may be the only way to insure that exemption 5 is properly applied. *In camera* inspection, however, will not be necessary in all cases.[2] *See generally Mead Data, supra*, 184 U.S.App.D.C. at 358 & n.10, 368, 369-70, 566 F.2d at 250 & n.10, 260, 261-62.

Our examination of the record in this case indicates that *in camera* inspection is not required. Mr. Smith's sworn affidavit (Brief for Appellee, App. at 42-44) satisfies us that, to the extent the documents at issue contain factual material, it is incidental to and bound up with, discussion of litigation strategy and the deliberative processes of attorneys actively preparing their defense for a pending lawsuit.[3] Since the affidavit establishes that the "factual" material is actually privileged attorney work-product, further inquiry is not necessary.[4]

[827] In coming to this conclusion, we stress that this case concerns the attorney work-product privilege, not the privilege for governmental deliberation. The likelihood that factual material will be segregable is smaller in cases dealing with the attorney work-product than in cases dealing with the governmental deliberative process. In

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[2] The Supreme Court in *Sears, Roebuck, supra*, this court in *Montrose Chemical, supra*, and the Fifth Circuit in *Kent Corp., supra*, and *Robbins Tire, supra*, held that *in camera* inspection was not necessary in resolving issues of the type raised here.

[3] The Smith affidavit describes the four documents and then states: "The documents . . . contain selected background information, legal analysis, and recommended courses of action regarding plaintiff's claims against the Commission." (Brief for Appellee, App. at 44.)

[4] The dissent asserts that the district court denied appellant's request for disclosure of even those "segregable" portions of the memoranda containing only statements of fact concerning his dismissal. Dissenting opinion at 832. This characterization is inaccurate. The request for disclosure was denied because the factual material was not segregable—it was part of the work-product.

The dissent's interpretation is based on the District Court's statement that "once a document is classified as work product, even factual matters in the document are exempt from disclosure under the Act. *Kent Corporation* v. *NLRB*, 530 F.2d 612 ([5th Cir.] 1976)." Obviously, the statement must be read in the context of the *Kent* case, and in *Kent* the segregability issue was specifically addressed.

> [T]he question is whether any reasonably segregable portion of the documents remains after the parts protected by work-product policies are determined. In our view, even the factual matters in these reports . . . are protected by the work-product privilege. . . . Writing in contemplation of forthcoming . . . litigation, an attorney must be able not only to discuss doctrinal theories but also to "assemble information, [and] sift what he considers to be the relevant from the irrelevant facts" without feeling that he is working for his adversary at the same time. *Hickman* v. *Taylor*, 329 U.S. at 511, 67 S.Ct. 385. . . . The feeling would be well justified if we allowed the FOIA to be used to force disclosure of such materials.

530 F.2d at 624. The District Court, then, was not unaware of the application of the segregability requirement to Exemption 5, as the dissent implies. Rather, the District Court was persuaded (as we are) that, like *Kent*, the factual matters are not segregable from the privileged work-product.

the process of administrative decision making, it is likely that factual documents will be developed, for example, by lay personnel without decisionmaking or advisory authority, which can be segregated from deliberative material without difficulty, and with minimal danger than the deliberative process will thereby be excessively exposed. On the other hand, an attorney's written product in preparing for litigation, even if factually oriented, seldom can be separated from his tactical and strategic thinking. As a result, the government's assertion that an attorney's work-product is not segregable permits a court to apply a broader privilege than in those cases where the work-product privilege is not involved.

[9] Mervin urges that factual material within the attorney work-product is exempt from disclosure only if the facts are available to the requestor from some other source. Apparently the only case to so hold is *Morton-Norwich Products, Inc.* v. *Mathews,* 415 F.Supp. 78, 82 (D.D.C.1976). It is not necessary for us to consider whether this rule should apply in FOIA cases generally. It suffices for the present case to hold, that in view of the strong public policies furthered by the privilege for attorney work-product, factual material may be protected as part of attorney work-product even though it is not reasonably available to the requestor from another source. We note that the Supreme Court in *Mink* described the segregable portions rule as requiring disclosure of "purely factual material appearing in those documents in a form that is severable *without compromising the private remainder of the documents.*" 410 U.S. at 91, 93 S.Ct. at 838 (emphasis added). *See also* 5 U.S.C. § 552(b) ("*reasonably* segregable portion") (emphasis added); *Schwartz* v. *IRS,* 167 U.S.App.D.C. 301, 303, 511 F.2d 1303, 1305 (1975), and the cases cited in note 8 therein.

We therefore conclude that the District Court was correct in holding, on the basis of the Smith affidavit submitted by the FTC, that the material Mervin seeks is exempt from disclosure under FOIA exemption 5.

B

[10, 11] Secondly, Mervin seeks under the Privacy Act, 5 U.S.C. § 552a(d)(2), to have the FTC amend its records concerning his dismissal to remove references that he was dismissed for inefficiency. The FTC has refused on the ground it believed the references to be accurate.

When a plaintiff seeks disclosure of records under the Privacy Act, subsection (g)(3) of that act states that the agency shall bear the burden of proving that they should not be disclosed. Subsection (g)(2)(A), concerning requests such as this one to *amend* allegedly in-

accurate records, contains no provision allocating the burden of proof. Legislative history and reported decisions also shed no light on this question. In these circumstances, we agree with the District Court that the ordinary rule imposing the burden of proof on the plaintiff should apply. After reviewing the record, we also agree with the District Court that Mervin could not meet that burden. The judgment against Mervin on his second cause of action is also affirmed. [828]

C

Mervin's final cause of action alleges that his discharge from FTC employment violated both the due process clause of the Fifth Amendment and FTC personnel regulations. We affirm this portion of the judgment as well.

[12-15] 1. *Due Process.* Mervin did not have a civil service appointment, and served at the pleasure of his superiors. Therefore, he had no property right to continued employment cognizable under the due process clause. *Perry* v. *Sindermann,* 408 U.S. 593, 599-603, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972).[5]

He would, however, have a cause of action infringement of his liberty, if the circumstances of his dismissal were such as would effectively foreclose his opportunities to obtain future employment in his profession. *Board of Regents* v. *Roth,* 408 U.S. 564, 573-74, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972). The standard is a fairly high one; the courts do not sit as general public employee grievance review boards. Dismissal from employment, without more, might well make the search for a new job difficult. But this in itself is not a due process violation. *Mazaleski* v. *Treusdell,* 183 U.S. App.D.C. 182, 190-96, 562 F.2d 701, 709-15 (1977). It appears from the record that FTC officials communicated to Mervin's prospective employers their belief that he did not adequately and efficiently perform his duties at the FTC. Comparing this case to *Mazaleski* and the many cases cited therein (*id.* at 195, 562 F.2d at 714), we conclude that the District Court was correct in holding that Mervin's liberty interest was not infringed by the FTC.[6]

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[5] Mervin does not argue that the FTC administrative manual, discussed *infra,* conferred upon him a "property" interest in continued employment protected under the due process clause. *See Mazaleski* v. *Treusdell,* 183 U.S.App.D.C. 182, 190-91 n.23, 562 F.2d 701, 709-10 n.23 (1977). We refrain from deciding this issue in view of our conclusion that this portion of Mervin's case is barred for other reasons.

[6] The District Court concluded that *Paul* v. *Davis,* 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976), barred this cause of action. We question this reading of *Paul,* which held that reputation without more is not a liberty or property interest protected by the due process clause, but specifically distinguished the situation where termination of employment was also at stake. *Id.* at 701, 96 S.Ct., 1155. The *Paul* court discussed *Roth, supra,* stating that by contrast an employer who deframed an employee still on the payroll would not be subject to a due process action. *Id.* at 710, 96 S.Ct. 1155. It therefore appears that *Paul* and *Roth* can be read consistently with one another. But in any event we hold that Mervin has not proven his case under *Roth* and its progeny.

[16, 17] 2. *FTC Regulations.* Mervin contends that his discharge violated provisions of the FTC administrative manual establishing a performance rating plan for employees. The relevant portions of the manual, as they read at the time Mervin was discharged, provided that an employee who was to be given an "unsatisfactory" rating must be given a written notice of the specific deficiencies in his performance and at least 90 days in which to improve. § 5-430.14. An "unsatisfactory" rating constituted a basis, but not the only permissible basis, for removing an employee from his position (although not necessarily from the FTC's employ entirely, if another job to which he was better suited could be found). § 5-430.21. Finally, when a reduction in force was to be made due to lack of funds, all affected employees with "unsatisfactory" ratings must be terminated before any others. § 5-430.22 (Brief for Appellee, App. at 62-70).

The record does not indicate that Mervin ever received an "unsatisfactory" rating under this chapter of the administrative manual. The notice of termination which was sent to him on December 31, 1970, stated that he was being discharged because of a lack of funds (R. 9 at 85). In a letter of February 16, 1973 to the Civil Service Commission (CSC), which was investigating Mervin's case, the Executive Director of the FTC stated that Mervin was not discharged as part of a reduction in force due to lack of funds. The letter states that he was actually terminated "because the management officials of this agency were committed to **[829]** making it operate more efficiently." The statement about lack of funds, the letter said, was inaccurate and had been given to Mervin to spare his feelings (Brief of Appellee, App. at 31).

Mervin's grievance on this theory has two aspects. First, he contends that the reason for his discharge which was communicated to the CSC and to his prospective employers—that he could not adequately and efficiently perform his duties—is tantamount to an "unsatisfactory" rating in substance, if not in form. Therefore, he argues, the FTC must be held to the procedures in its administrative manual for the imposition of "unsatisfactory" ratings, procedures which include notice and an opportunity to improve. It is undisputed that the FTC did not follow those procedures in Mervin's case.

An agency cannot be permitted to exalt form over substance and deny an employee the procedural safeguards required for an "unsatisfactory" rating, merely by discharging him for a reason that is, in everything but name, an "unsatisfactory" rating. The agency's obligation to follow its own procedural rules exists to protect the rights of those such as Mervin who deal with the agency. Therefore it is an obligation to follow their spirit as well as their letter. *See Thomas* v. *Ward*, 96 U.S.App.D.C. 302, 306, 225 F.2d 953, 957 (1955) (Bazelon, J., concurring), *cert. denied*, 350 U.S. 958, 76 S.Ct. 348, 100

L.Ed. 833 (1956); K. Davis, *Administrative Law of the Seventies*, § 5.03-5 (Supp.1977).

It appears, however, that Mervin has never attempted to pursue administrative remedies with respect to this claim. He apparently learned of the letter referring to inefficiency while attempting to pursue an administrative appeal before the Civil Service Commission. He included it in his District Court complaint against the Civil Service Commission, and in the complaint in this case against the FTC. But nothing in the record indicates that he ever presented this theory to the FTC. Therefore, judicial review at this point is not appropriate, and the District Court correctly dismissed the complaint insofar as it relied on this theory. This disposition is, of course, without prejudice to an attempt to pursue administrative remedies at this time, and seek judicial review thereafter, subject to whatever barriers may be presented by the statute of limitations at this late date.[7]

Whatever the FTC's actual reasons for discharging Mervin, he may have been entitled to be treated as though his discharge were part of a reduction in force, because that was the reason given to him at the time. If so, Mervin should have been discharged only if at the time of the discharge no competing employees with "unsatisfactory" ratings were retained in the area of FTC work where increased efficiency was needed. FTC Admin. Manual, § 5-430.22, *supra*. The record does not reveal whether there were any such employees. If we so treated the case, this would be a material issue of fact requiring reversal of the summary judgment.

At oral argument, Mervin also referred to 5 C.F.R. § 351.601, a regulation of the CSC which he alleged also required that employees with "unsatisfactory" ratings be discharged first.

[18-21] We hold that it is too late in the day for Mervin to obtain relief on any of these theories, assuming we would find them meritorious. Shortly after his discharge, he filed a civil action in the District Court seeking reinstatement. *Mervin* v. *FTC*, Civ. No. 679-71 (D.D.C., filed April 6, 1971). On January 19, 1973, the action was dismissed without prejudice for failure to exhaust administrative remedies. We af[830]firmed that dismissal, 160 U.S.App.D.C. 148, 489 F.2d 1272 (1974), and certiorari was denied, 417 U.S. 930, 94 S.Ct. 2640, 41 L.Ed.2d 233 (1974). Meanwhile, Mervin attempted to pursue administrative remedies. He petitioned the CSC for relief. The CSC dismissed the appeal as untimely (Brief of Appellee, App. at 28-29). Mervin thereupon sued the CSC asking a mandatory injunc-

[7] The basic statute of limitations for claims against the federal government, 28 U.S.C. § 2401(a), bars actions not filed "within six years after the right of action first accrues." If this claim "accrued" at the time of Mervin's discharge early in 1971, it would appear to be barred. On the other hand, Mervin apparently learned early in 1973 that inefficiency had been a reason for his firing; if the six-year period is measured from that date a prompt suit would not be time-barred. At this stage of the proceedings, it is unnecessary for us to decide this question.

tion directing it to consider the merits of his appeal. *Mervin* v. *United States Civil Service Comm'n,* Civ. No. 74-1297 (D.D.C., filed Aug. 29, 1974). On June 16, 1975, Judge Sirica dismissed the case for failure to state a claim.

In the attempted administrative appeal and these two prior civil suits, Mervin proceeded on the theory that he had been discharged from the Federal Trade Commission as part of a reduction in force. He cited the CSC regulation in these prior proceedings, but not the provisions of the FTC administrative manual (R. 9 at 101). Therefore it is clear that in his first two lawsuits, he was pursuing the same cause of action, involving the same dismissal, as he is in the present suit: seeking reinstatement because of allegedly improper dismissal procedures. Principles of *res judicata* prevent relitigation not only on the grounds or theories actually advanced, but also on those which could have been advanced in the prior litigation. Restatement of Judgments §§ 62, 63 (1942); Restatement (Second) of Judgments §§ 61, 61.1 (Tent.Draft No. 1, 1973); 1B Moore's Federal Practice ¶ 0.405[1] at 621-22 (2d ed. 1974).[8] In the statement of related cases (required by our local rule 8(b) in his brief in the present case, Mervin stated that "The pending case was previously before this Court under the same title, No. 73-1330." We agree with his characterization.

The fact that the present defendant is the FTC, while the defendant in one of the prior cases was the CSC, does not prevent application of the principle of *res judicata* to the judgment in that case. "There is privity between officers of the same government so that a judgment in a suit between a party and a representative of the United States is *res judicata* in relitigation of the same issue between that party and another officer of the government." *Sunshine Anthracite Coal Co.* v. *Adkins,* 310 U.S. 381, 402-03, 60 S.Ct. 907, 917, 84 L.Ed. 1263 (1940).

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[8] The rule is stated thus in the proposed Second Restatement of Judgments:

> § 61. Dimensions of "Claim" for purposes of Merger or Bar—General Rule Concerning "Splitting"
>
> (1) When a valid and final judgment rendered in an action extinguishes the plaintiff's claim pursuant to the rules of merger or bar . . . the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose.
>
> (2) What factual grouping constitutes a "transaction", and what groupings constitute a "series", are to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage.

Restatement (Second) of Judgments § 61 (Tent. Draft No. 1, 1973).

> § 61.1 Exemplifications of General Rule Concerning Splitting
>
> The rule of § 61 applies to extinguish a claim by the plaintiff against the defendant even though the plaintiff is prepared in the second action
>
> (a) To present evidence or grounds or theories of the case not presented in the first action, or
>
> (b) To seek remedies or forms of relief not demanded in the first action.
>
> *Id.* § 61.1

Accord, River Valley, Inc. v. *Dubuque County,* 507 F.2d 582 (8th Cir. 1974); *United States* v. *Willard Tablet Co.,* 141 F.2d 141 (7th Cir. 1944); *Second Nat'l Bank of Saginaw* v. *Woodworth,* 54 F.2d 672, 674 (E.D.Mich.1931). *See* Comment, Res Judicata and Intra-Governmental Inconsistencies, 49 Columbia L.Rev. 640, 653-54 (1949). The CSC was involved in the prior case only because statutes and regulations establish it as the forum for administrative appeals by terminated government employees. Mervin was pursuing the same "reduction in force" issue he advances here.

We are aware that the prior court decisions did not address the merits of Mervin's [831] contentions. However, the records of the prior cases reveal that Mervin, an attorney, consciously chose to begin by seeking judicial rather than administrative remedies, and did not first seek administrative relief until several months after he was put on notice that that was the proper course of action (Brief for Appellee, App. at 28-29). His suit against the Civil Service Commission was dismissed under Fed.R.Civ.P. 12(b)(6) for failure to state a claim, since he sought relief which was beyond the power of the CSC to give. This is an adjudication on the merits having full *res judicata* effect. *Taylor* v. *New York City Transit Auth.,* 433 F.2d 665, 668 (2d Cir. 1970)(public employee discharge; judicial review of administrative proceedings); *Hubicki* v. *ACF Industries, Inc.,* 484 F.2d 519, 523 (3d Cir. 1973). *See Blackhawk Heating & Plumbing Co.* v. *Driver,* 140 U.S.App.D.C. 31, 38, 433 F.2d 1137, 1144 (1970); Restatement (Second) of Judgments 48, Comment a (Tent.Draft No. 1, 1973); 2A Moore's Federal Practice ¶ 12.09[3] at 2313 (2d ed. 1975).[9] It therefore is unnecessary for us to consider whether Mervin should have been granted relief had he promptly and properly sought these remedies through the administrative process.

The judgment of the District Court dismissing this action in its entirety is affirmed.

Judgment accordingly.

BAZELON, *Circuit Judge,* concurring in part and dissenting in part.

I concur in Parts B and C of the court's opinion, relating to appellant Mervin's Privacy Act and wrongful dismissal claims. I can-

[9] Increasingly . . . by statute, rule, or court decision, judgments not passing directly on the substance of the claim have come to operate as a bar. . . .

> The rule that a defendant's judgment acts as a bar to a second action on the same claim is based largely on the ground that fairness to the defendant, and sound judicial administration, require that at some point litigation over the particular controversy come to an end. These considerations may impose such a requirement even though the substantive issues have not been tried, especially if the plaintiff has failed to avail himself of opportunities to pursue his remedies in the first proceeding. . . .

Restatement (Second) of Judgments § 48, Comment a (Tent.Draft No. 1, 1973).

not, however, subscribe to the court's disposition of appellant's request for disclosure of documents under the Freedom of Information Act (FOIA).

The decisions of this circuit have clearly established that nonexempt portions of an otherwise exempt document must be disclosed unless they are "inextricably intertwined with exempt portions." *Mead Data Central, Inc.* v. *United States Dep't of Air Force,* 184 U.S.App.D.C. 350, 368, 566 F.2d 242, 260 (1977); *accord, Washington Research Project, Inc.* v. *Dept. of HEW,* 164 U.S.App.D.C. 169, 180, 504 F.2d 238, 249 (1974); *Bristol-Myers* v. *FTC,* 138 U.S.App.D.C. 22, 26, 424 F.2d 935, 939 *cert. denied,* 400 U.S. 824, 91 S.Ct. 46, 27 L.Ed.2d 52 (1970). In 1974, Congress expressly incorporated this requirement into FOIA by providing that "any reasonably segregable portions of a record shall be provided . . . after deletion of the portions which are exempt under this subsection." Pub.L.No. 93-502, § 2, 88 Stat. 1561, 5 U.S.C. § 552(b) (1976). Moreover, we have repeatedly emphasized that FOIA places the burden of justifying nondisclosures of reasonably segregable material on the agency seeking to withhold information and that this burden cannot be satisfied by sweeping claims of exemptions and conclusory allegations. *See, e.g., Mead Data Central, Inc.* v. *United States Dep't of Air Force,* 184 U.S.App.D.C. 350, 368-70, 566 F.2d 242, 260-62 (1977); *Vaughn* v. *Rosen,* 173 U.S.App.D.C. 387, 195-96, 52ir Force, 184 U.S.App.D.C. 350, 368-70, 566 F.2d 242, 260-62 (1977); *Vaughn* v. *Rosen,* 173 U.S.App.D.C. 187, 195-96, 523 F.2d 1136, 1144-45 (1975). Thus, FOIA requires that every effort be made to separate and disclose those portions of attorney work-product documents that do not reveal the thought processes and strategies of the attorney. *See, e.g., Deering Milliken, Inc.* v. *Irving,* 548 F.2d 1131 (4th Cir. 1977).

The majority opinion, however, suggests that where attorney work product is involved, courts are permitted "to apply a [832] broader privilege than in those cases where the work-product privilege is not involved." Majority opinion at 827 of 591 F.2d. By reducing the government's burden of demonstrating nonsegregability and creating a lower standard of judicial review for claims of exemption under the attorney work product privilege of Exemption 5, the majority's position violates the clear language of FOIA. In the 1974 amendments, Congress specifically mandated that for *all* claims of exemption—even those based on national security, an area in which the special expertise of the government agencies has been recognized—the courts shall "determine the matter *de novo*" and "the burden is on the agency to sustain its action." 5 U.S.C. § 552(a)(4)(B).

In the present case, the FTC's supporting affidavit does not even allege that any attempt has been made to segregate and disclose

statements of fact from material that would otherwise reveal the thought processes of the attorneys. The Commission assserts only that the documents contain "selected background information, legal analyses, and recommended courses of action regarding plaintiff's claims against the Commission," thus constituting attorney work product. Nonetheless, the district court denied appellant's request for disclosures "of at least segregable, factual portions" of certain documents concerning his dismissal. Complaints for Injunctive Relief, Brief for Appellee, App. at 49. Since the District Court never examined those documents, it apparently based its decision on its view that "once a document is classified as work product, even factual matters in the document are exempt from disclosure under the Act." District Court Opinion at 4. Although an attorney's summary of the facts of a case will often be revealing enough to merit an exemption, the district court's interpretation of the scope of Exemption 5 flies in the face of the explicit language of FOIA and previous decisions of this court directing that non-exempt factual information be segregated and disclosed.[1]

In some cases an affidavit sufficiently detailed to allow *de novo* review could reveal the very information that the agency claims to be exempt. But this circumstance does not relieve the government of its burden of justifying nondisclosure or the court of its responsibility to conduct full *de novo* review of the agency decision. Recognizing that the government would not always be able to demonstrate that withheld documents were clearly exempt from disclosure by means of detailed affidavits and testimony, Congress expressly provided that the district court "may examine the contents of such agency records *in camera* to determine whether such records *or any part thereof* shall be withheld." 5 U.S.C. 552(a)(4)(B) (emphasis added). *In camera* inspection is particularly appropriate where, as here, the documents are limited in number and length, they are not particularly sensitive, and evaluation of the government's claim does not require any special knowledge or expertise.[2]

[1] The majority opinion explains that the District Court's assertion that even factual matters in attorney work product are exempt from disclosure must be read in the context of *Kent Corporation* v. *NLRB*, 530 F.2d 612 (5th Cir. 1976). Maj. Opinion at 826 n.4 of 591 F.2d. The majority then concludes that, like *Kent*, the District Court was persuaded that the factual matters were not segregable from the privileged work product. The *Kent* court, however, had conducted *in camera* inspection before determining that the factual matters in the specific work product reports at issue there were not segregable. In the present case, the District Court did not conduct *in camera* inspection. Further, although supporting affidavits may describe the documents in sufficient detail to allow *de novo* review without resort to *in camera* inspection, the Smith affidavit did not even allege that the factual material was not segregable.

[2] The circumstances of the present case contrast markedly with those of another recent Exemption 5 case before this court, *Bristol-Myers Co.* v. *FTC*, 598 F.2d 18 (1978), in which we held that *in camera* inspection was unnecessary for resolution of the plaintiff's claim. In that case, the district court was plainly aware of the requirement that segregable portions of an otherwise exempt doctrine be disclosed, and the Commission supplied detailed descriptions of the documents and justifications, including hypothetical illustrations, for its claim that segregation was impracticable. *Id.* at 598 F.2d at 20, n.23. In the present case, the district court was apparently unaware of the application of the segregability requirement to Exemption 5, and the government affidavit neither alleged nor established that factual material could not be segregated and disclosed without revealing the thought processes of the attorneys.

[833] Because the district court in the present case failed to consider whether factual material in these documents could be segregated without revealing the attorneys' thought processes, I would remand for either further government affidavits or *in camera* inspection of the documents.

ASSOCIATION OF NATIONAL ADVERTISERS, INC., et al. *v.* FEDERAL TRADE COMMISSION et al.*

Civ. A. No. 78-1421. F.T.C. File No. 99-410.

(United States District Court, District of Columbia, November 3, 1978)

1. DISQUALIFICATION OF FTC COMMISSIONER IN ADJUDICATIVE PROCEEDING IS JUSTIFIED IF A DISINTERESTED OBSERVER MAY CONCLUDE THAT OFFICIAL HAS IN SOME MEASURE PREJUDGED FACTS AND LAW GOVERNING THE CASE.

   Test for disqualification of federal trade commissioner in adjudicative proceeding is whether disinterested observer may conclude the commissioner has in some measure adjudged facts as well as law of particular case in advance of hearing it.

2. NOT ONLY EVERY ELEMENT OF FAIRNESS, BUT THE VERY APPEARANCE OF COMPLETE FAIRNESS MUST ATTEND AN ADJUDICATIVE PROCEEDING BEFORE FTC COMMISSIONER.

   Adjudicative proceeding before federal trade commissioner must be attended not only with every element of fairness, but with very appearance of complete fairness.

3. SINCE SOME ASPECTS OF RULEMAKING PROCEEDINGS ARE ADJUDICATIVE IN NATURE AND FINAL AGENCY MUST SATISFY SUBSTANTIAL EVIDENCE TEST ON JUDICIAL REVIEW, COMMISSIONER'S CONDUCT MUST BE SUCH AS TO PRECLUDE ANY CONCLUSION OF PREJUDGMENT.

   Federal Trade Commission's final action in every FTC rule-making proceeding must satisfy substantial evidence test on judicial review after parties have been afforded a circumscribed opportunity at agency level for cross-examination as to relevant disputed issues of material fact; thus, typically, some aspects of every such proceeding are adjudicative in nature so that conduct of each commissioner must be such that disinterested observer will not conclude that commissioner has in some measure adjudged facts as well as law in advance of hearing which must be attended not only with every element of fairness, but with very appearance of complete fairness.

4. EXCEPT WHERE ISSUE CANNOT BE RAISED FROM LATER AGENCY ORDER, OR WHERE AGENCY HAS CLEARLY VIOLATED A CONSTITUTIONAL OR STATUTORY RIGHT, COURT STAYS ITS HAND PENDING TERMINATION OF RULEMAKING PROCEEDING WHEN DISQUALIFICATION OF COMMISSIONER IS SOUGHT.

   Generally, when disqualification of commissioner in FTC trade regulation rulemaking proceeding is sought, district court stays its hand and lets parties await termination of administrative process, but there is exception where issue cannot be raised from later order of agency or where agency has very clearly violated important constitutional or statutory right.

5. RELEGATING DISQUALIFICATION ISSUE TO FINAL APPELLATE REVIEW WAS UNNECESSARY CONSIDERING CHAIRMAN'S PRECONCEPTIONS AND PLAINTIFFS' SUBSTANTIAL SHOWING

*Reported in 460 F.Supp. 996 (1978). Petition for declaratory and injunctive relief denied by D.C. Court of Appeals, January 16, 1979.

THAT HIS CONTINUED PARTICIPATION IN THE RULEMAKING PROCEEDING WOULD VIOLATE THEIR CONSTITUTIONAL RIGHT TO DUE PROCESS.

On motion to enjoin chairman of FTC from further participation in major trade regulation rule-making proceeding, movants made substantial showing that chairman's continued participation would violate movants' constitutional entitlement to due process and that given breadth and nature of chairman's preconceptions, there was no reason to relegate movants to final appellate review while chairman participated in all aspects of the rule making.

Plaintiff trade associations and companies who were parties to major trade regulation rule-making proceeding initiated by the Federal Trade Commission sought order disqualifying chairman of Commission from further participation in the proceeding. The District Court, Gesell, J., held that the plaintiffs made substantial showing that chairman's continued participation would violate plaintiffs' constitutional entitlement to due process and that, given breadth and nature of chairman's preconceptions, there was no reason to relegate plaintiffs to final appellate review while chairman participated in all aspects of instant rule making.

Judgment and order accordingly.

(Syllabus, with substituted captions, taken from 460 F.Supp. 996)

Gilbert H. Weil, New York City, for Association of National Advertisers, Inc.

Walter L. Stratton, New York City, for American Association of Advertising Agencies.

William W. Rogal, Washington, D.C., for American Advertising Federation.

Aaron Locker, New York City, for Toy Manufacturers of America, Inc.

Frederick P. Furth, Thomas R. Fahrner, San Francisco, Cal., *Samuel H. Seymour,* Washington D.C., for intervening plaintiff Kellogg Co.

Michael N. Sohn, Gen. Counsel, *Gerald P. Norton,* Deputy Gen. Counsel, *W. Dennis Cross,* Asst. Gen Counsel, *David M. Fitzgerald,* Atty., FTC, *Ann DuRoss,* Asst. U.S. Atty., Washington, D.C., for defendants.

MEMORANDUM

GESELL, *District Judge.*

The Federal Trade Commission has instituted a major trade regulation rulemaking proceeding, captioned Children's Advertising, under Section 18 of the Magnuson-Moss Federal Trade Commission Improvement Act, Pub.L. 93-637, 88 Stat. 2193 (1974), 15 U.S.C. § 57a (1976). Plaintiffs and plaintiff-intervenor are various trade associations and companies who are parties to the proceeding and who may be adversely affected by the proposed regulations delineated in 43 Fed.Reg. 17967 (April 27, 1978). After unsuccessfully presenting the

issue to the Commission, plaintiffs come to this Court seeking an order disqualifying the Chairman of the Commission from further participation in this rulemaking proceeding. Plaintiffs' motion rests on the grounds that the Chairman has prejudged issues of fact whose resolution will be necessary to a fair determination of the rulemaking and which will come before him in a quasi-judicial capacity, and that by his public and private actions he has also created the appearance of prejudgment and bias. There are no material facts in dispute and the matter is before the Court on cross-motions for summary judgment, after briefs and full argument.

[1-3] In an adjudicative proceeding an FTC Commissioner must satisfy the standards of conduct laid down in *Cinderella Career and Finishing Schools, Inc.* v. *FTC*, 138 U.S.App.D.C. 152, 160, 425 F.2d 583, 591 (1970), to wit:

> The test for disqualification [is] . . . whether 'a disinterested observer may conclude that [the agency] has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it.'
>
> * * * * * * *
>
> [An] administrative hearing 'must be attended, not only with every element of fairness but with the very appearance of complete fairness' . . ..

Accord, Texaco, Inc. v. *FTC*, 118 U.S. App.D.C. 366, 336 F.2d 754 (1964), *vacated and remanded on other grounds*, 381 U.S. 739, 85 S.Ct. 1798, 14 L.Ed.2d 714 (1965). Considerable argument has been heard as to the proper characterization of the instant rulemaking proceeding. Clearly, the proceeding is neither wholly legislative nor wholly adjudicative. Rather, it has substantial elements of both and in fact is a hybrid proceeding, unique to the Federal Trade Commission. The Commission's final action in every FTC rulemaking proceeding must satisfy the "substantial evidence" test on judicial review after there has been afforded the parties a circumscribed opportunity at the agency level for cross-examination with respect to relevant disputed issues of material fact. 15 U.S.C. § 57a(c) & (e)(3). Typically, therefore, some aspects of every FTC rulemaking proceeding are adjudicative in nature. *See generally*, H.R.Rep. No. 93-1107, 93d Cong., 2d Sess. (1974), reprinted in 1974 U.S. Code Cong. & Admin. News at 7702, 7715, 7727-29; S.Rep. No. 93-1408 (Conf.Rep.), 93d Cong., 2d Sess. (1974), reprinted in 1974 U.S.Code Cong. & Admin. News at 7755, 7765-67. The *Federal Register* notice announcing the Children's Advertising rulemaking makes clear that the instant proceeding does not fall outside this typical mold: the Commission itself lists a number of "issues of fact" as to which the parties have been requested to comment. *See* 43 Fed.Reg. 17969-70 (April 27, 1978). Consequently, each Commissioner participating

must be held to the standard of conduct delineated in *Cinderella*. The parties to this proceeding are as a matter of [998] fundamental due process entitled to a final rulemaking decision that will be premised on factual determinations which have not been prejudged in advance or tainted by the participation of one whose objectivity is subject to serious question.

Upon examination of the Chairman's public statements[1] and correspondence of record,[2] a very substantial showing has been made that the Chairman has conclusively prejudged factual issues which will be disputed in the rulemaking proceeding and whose resolution will be necessary for a fair determination of the rulemaking as a whole. Going far beyond general observations of policy and tentative statements of attitude, the Chairman has by his use of conclusory statements of fact, his emotional use of derogatory terms and characterizations, and his affirmative efforts to propagate his settled views made his further participation improper. Plaintiffs' showing is far more compelling than that found to be sufficient to justify disqualification in the *Cinderella* and *Texaco* cases. Certainly, plaintiffs present such special facts and circumstances as to make "the risk of unfairness . . . intolerably high." *See Withrow* v. *Larkin*, 421 U.S. 35, 47, 58, 95 S.Ct. 1456, 35 L.Ed.2d 712 (1975).

[4] This conclusion does not, however, settle the matter. The normal manner of reviewing an FTC trade regulation rulemaking proceeding is pursuant to 15 U.S.C. § 57a(e) in a United States Court of Appeals. Plaintiffs' disqualification claim is one aspect of this proceeding which would ultimately be subject to judicial scrutiny in this manner. Plaintiffs, though, are not awaiting the outcome of the agency process, which will be several years hence; they are petitioning this District Court to intervene at this time with respect to the disqualification issue. The general rule in this kind of circumstance—and it is a sound one—is that the District Court stay its hand and let the parties await the termination of the administrative process. *Nader* v. *Volpe*, 151 U.S. App.D.C. 90, 94-97, 466 F.2d 261, 265-68 (1972).

[5] There exist, however, settled exceptions to this rule. As stated in *Fitzgerald* v. *Hampton*, 152 U.S.App.D.C. 1, 14, 467 F.2d 755, 768 (1972), *quoting Sterling Drug, Inc.* v. *FTC*, 146 U.S.App.D.C. 237, 249, 450 F.2d 698, 710 (1971):

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[1] In this regard, the Court does not consider (against the interest of defendants) any of the statements made by Chairman Pertschuk at the "sunshine" meeting held on February 28, 1978, at which meeting the Commissioners voted to initiate the Children's Advertising rulemaking. By law, the Commission must initiate a trade regulation rulemaking proceeding by publishing "a notice of proposed rulemaking stating with particularity the reason for the proposed rule . . .." 15 U.S.C. § 57a(b).

[2] Some of this correspondence was obtained by plaintiffs, through agency responses to plaintiffs' Freedom of Information requests, after the disqualification issue had been presented to, and rejected by, the Commission. The defendants argue that the Court may not consider these items, by reason of the failure of plaintiffs to exhaust their immediately available administrative remedies. The Court rejects this contention: the information was obtained from the FTC's own files and is merely cumulative of the evidence that was presented to the Commission.

[A] party may bypass established avenues for review within the agency only where the issue in question cannot be raised from a later order of the agency . . ., or where the agency has very clearly violated an important constitutional or statutory right.

Amos Treat & Co. v. *SEC*, 113 U.S.App.D.C. 100, 306 F.2d 260 (1962),[3] applied the second exception to a case very analogous to the instant action. There, it was held that an SEC Commissioner could be enjoined by a District Court from further participation in [999] an SEC adjudicative proceeding where he had earlier participated in the investigative phase of the particular case. Intervention was justified because the "infirmity" was "fundamental," *id.*, 113 U.S.App.D.C. at 102, 105, 306 F.2d at 262, 265, and the hearing had great "importance and vast potential consequences . . .", *id.*, 113 U.S.App.D.C. at 107, 306 F.2d at 267. That case directly controls here. Plaintiffs have made a substantial showing[4] that the Chairman's continued participation in this rulemaking proceeding will and does violate their constitutional entitlement to due process. The rulemaking here has great "importance and vast potential consequences" and the Chairman's prejudgment taints the entire proceeding. Plaintiffs have a right to a disinterested objective rulemaking hearing. There is no reason, given the breadth and nature of the Chairman's preconceptions, to relegate plaintiffs to final appellate review while the Chairman participates in all aspects of the instant rulemaking. As in *Amos Treat & Co.* v. *SEC*, *supra*, the Court concludes that the plaintiffs have made a "substantial showing" that continued participation of the Chairman would render the proceedings void and so irrevocably tainted that any final determination which might flow from such proceedings would be invalid. For these reasons, intervention by this Court at this time is fully warranted and a declaratory judgment and injunction is issued.

[3] The *Amos Treat* decision was discussed and followed in *Fitzgerald* v. *Hampton*, *supra*, 152 U.S.App.D.C. at 14-15, 467 F.2d at 768-69. *Amos Treat* is therefore sound precedent in this Circuit. As a more recent decision, it also must be accorded more weight by this Court than *National Lawyers Guild* v. *Brownell*, 96 U.S.App.D.C. 252, 225 F.2d 552 (1955), *cert. denied*, 351 U.S. 927, 76 S.Ct. 778, 100 L.Ed. 1457 (1956). All the same, the latter case is probably distinguishable from the instant action: the showing made there of prejudgment was rebutted and less substantial than the showing which has been made here.

[4] In this respect, this case differs from *SEC* v. *R.A. Holman & Co.*, 116 U.S.App.D.C. 279, 323 F.2d 284, *cert. denied*, 375 U.S. 943, 84 S.Ct.

AMERICAN MOTORS CORPORATION et al.
v.
FEDERAL TRADE COMMISSION et al.*

Civ. A. No. 78-72335. F.T.C. File No. 99-422.

(United States District Court, Eastern District of Michigan, November 15, 1978)

Court denied FTC motion to dismiss or transfer an action seeking declaratory and injunctive relief against the agency and its Commissioners, holding, *inter alia*, that since FTC Motion to Quash procedure failed to afford plaintiffs an adequate opportunity to challenge the allegedly overbroad scope of the Resolution authorizing the Automobile Industry Investigation, exhaustion of administrative remedies was not required.

Before KAESS, *District Judge.*

MEMORANDUM OPINION

On August 2, 1976, members of the Federal Trade Commission (hereinafter "FTC") approved a resolution which authorized an industry-wide investigation of the United States automobile industry. The resolution reads as follows:

> To investigate the acts, practices and methods of competition of General Motors Corporation, Ford Motor Company, Chrysler Corporation and other firms engaged in the production, sale, and distribution of automobiles to determine the effects thereof on the structure, conduct and performance of the automobile industry and whether such acts, practices and methods of competition may have violated or are violating the Federal Trade Commission Act or other statutes administered by the Commission.

For nearly two years thereafter the automobile manufacturers voluntarily cooperated with the FTC in an attempt to coax the agency to state a purpose for the investigation beyond that set forth in the resolution and to narrow the scope of the investigation. These efforts went for nought when the FTC issued formal subpoenas duces tecum on July 10, 1978.[1]

In response, American Motors Corporation; Chrysler Corporation; General Motors Corporation; Dalgleish Cadillac, Inc.; and Charnock

*Not otherwise reported. *Rev'd*, 601 F.2d 1329 (1979).

[1] The subpoena to General Motors Corporation is over 57 pages in length, and makes 199 multi-part requests for documents which cover virtually every aspect of the automobile industry. The information sought includes records that date back to 1946 and extends to forecasts of 1980. The subpoenas to the other automobile manufacturer plaintiffs are similar in length and scope.

It should also be noted that upon repeated questioning by this Court, both in chambers and in open court, the FTC has declined to state any purpose for the investigation other than that contained in the resolution.

Olds, Inc., filed an action against the FTC and its Commissioners for declaratory and injunctive relief. The basis for plaintiffs' complaint is that the unstated purpose and unlimited scope of the resolution violates plaintiffs' Fourth and Fifth Amendment rights.[2] The FTC now brings this motion to dismiss or transfer.

The FTC makes three arguments in support of its motion to dismiss, and concludes with the allegation that plaintiffs have failed to state a claim upon which relief can be granted. Rule 12(b)(6), F.R.Civ.P.

The FTC's first argument is that this case should be dismissed due to the failure of plaintiffs to exhaust their administrative remedies. While conceding that there is no administrative procedure for directly challenging an authorizing resolution, the FTC contends that plaintiffs must first seek relief through motions to quash or limit the subpoenas before they are entitled to access to the courts.

Ordinarily, courts will not interfere with an agency until it has completed its action. This general rule is subject to three exceptions: (1) where the agency has clearly violated a right secured by statute or agency regulation; (2) where the issue involved is a strictly legal one not involving an agency's expertise or any factual determination; or (3) where the issue cannot be raised on judicial review of a later order of the agency. *Borden, Inc. v. Federal Trade Comm.*, 495 F.2d 785 (7th Cir. 1974).

The case before the Court falls squarely into the second exception to the general rule. Plaintiffs' complaint alleges a substantial constitutional deprivation; this is purely a question of law. It has been recognized that constitutional questions are particularly within the expertise of the courts. *See*, e.g., *Califano v. Sanders*, 430 U.S. 99, 109 (1977); *Airline Pilots Ass'n. v. Dept. of Transportation*, 446 F.2d 236, 241 (5th Cir. 1971); *School Dist. of City of Saginaw v. Dept. of HEW*, 431 F.Supp. 147, 153 (E.D. Mich. 1977).

In support of its position, the FTC relies primarily upon *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938), and *School Dist. of City of Saginaw, supra.* These cases, however, are readily distinguishable from the case at bar in that both cases involved factual questions which were best resolved by an administrative agency. The instant case presents no factual questions or questions which involve the FTC's expertise.

Moreover, this Court agrees with plaintiffs that there is no adequate administrative procedure available to them. A motion to quash or limit a subpoena is a back-door method of challenging an authorizing resolution. Because a subpoena is issued to carry out the purpose

[2] Of particular concern to plaintiffs is the highly confidential trade, proprietary, and financial information sought from them and from third parties, and the fear that this information will fall into the hands of their competitors.

and intent of an authorizing resolution, a proper resolution must precede a subpoena. *See, McMann v. Securities & Exchange Comm.*, 87 F.2d 377, 379 (2d Cir. 1937).

The inadequacy of a motion to quash as a method of challenging a resolution is further illustrated by the fact that a motion to quash must include all defenses to a subpoena, such as relevance, materiality, confidentiality, and burden. Without a statement of purpose and scope of an investigation to serve as standards, it is impossible to raise such defenses.

This Court is especially concerned with the highly confidential information sought by the FTC. A dissemination of this data, whether innocent or intentional, would have a disastrous effect on plaintiffs. Although the FTC assures this Court that adequate protections exist should the information come into its hands, the statutory sanctions against disclosure of proprietary information were found to be inadequate in *Wearly v. Federal Trade Comm.*, (Dkt. #77-1860), (D. N.J. 1978). It would be cold comfort to plaintiffs to know that a discloser has been caught and brought to justice while their competitors use the information to plaintiffs' detriment.

This problem is complicated by the fact that confidential information is also sought from third parties. The FTC has no procedure for challenging third-party subpoenas. The agency offers no guidance on this matter other than to say that it has permitted third-party challenges in some instances in the past, but it has no way of knowing how it would rule if plaintiffs contested the third-party subpoenas in the present case. The agency's position highlights the inadequacy of a motion to quash as a method to challenge the resolution.

The FTC's second argument alleges that plaintiffs' complaint fails to satisfy the Administrative Procedure Act (hereinafter "APA"), which thereby deprives the court of subject matter jurisdiction. This Court disagrees.

Plaintiffs' complaint states that subject matter jurisdiction over this action is provided by the "federal question" statute, 28 U.S.C. §1331(a), and the "laws affecting commerce" statute, 28 U.S.C. §1337. Hence, this Court has subject matter jurisdiction over the complaint. *See, Exxon Corp. v. Federal Trade Comm.*, 411 F.Supp. 1362, 1368-1369 (D. Del 1976); *General Motors Corp. v. Federal Trade Comm.*, 1978-1 Trade Cases ¶ 62,005 at 74,289 (N.D. Ohio 1977); *Wearly v. Federal Trade Comm.*, (Dkt. #77-1860, (D. N.J. 1978)).

The FTC goes on to argue that judicial consideration of this matter should be denied because this controversy is not ripe for judicial review. The basic rationale of the ripeness doctrine is to prevent the courts from entangling themselves in abstract disagreements over

administrative policies, and to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging party. *Abbott Laboratories v. Gardner,* 387 U.S. 136, 148-149 (1967).

Plaintiffs' constitutional challenge to the FTC's resolution is sufficiently ripe for judicial review. The controversy is adequately definite and concrete because the resolution is a final expression of the agency's position. A resolution is the only procedure provided for launching an investigation, is voted on by the Commissioners themselves, as opposed to subordinates, and is the only official statement by the agency of the scope and purpose of the investigation.

Moreover, the impact of the resolution has been felt by plaintiffs in terms of expenses incurred and disruption of their businesses. While a certain amount of expense and disruption is involved in every investigation, this is no ordinary case. General Motors itself has already spent $700,000.00 in order to determine how much it will ultimately cost to comply with the subpoena.[3] Although General Motors has the financial resources to absorb this initial expense, not all the other automobile manufacturers have that ability. This Court will not turn a deaf ear to the complaints of plaintiffs while there is the possibility that one or more domestic automobile manufacturers, in an already limited community, could be severly damaged by an illegal investigation. It is also disturbing to this Court that plaintiffs' constitutional allegations are met with procedural responses.

The equities in the present case require that the Court exercise its discretion in favor of plaintiffs, which distinguishes this case from those provided by the FTC. In *Parke, Davis & Co. v. Califano,* 564 F.2d 1200 (6th Cir. 1977), *cert. denied,* 98 S.Ct. 1253 (1978), the Sixth Circuit found that the District Court abused its discretion to enjoin the FDA where pending enforcement actions provided an opportunity for a full hearing on all issues raised in plaintiffs' complaint. There is no adequate administrative procedure for resolving the dispute in the present case. The District Court in *General Motors Corp. v. Federal Trade Comm., supra,* granted the FTC's motion to dismiss where a factual question existed which was best decided by the agency. There are no factual questions to be resolved in the case at bar. Lastly, the District Court exercised its discretion against judicial intervention in *Exxon Corp. v. Federal Trade Comm., supra,* where the controversy revolved around information subpoenaed by the agency and a procedure existed for challenging the subpoena. As previously stated, *there is no administrative procedure for challenging a resolution.*

[3] It has been revealed at a pretrial conference that the ultimate cost of compliance to General Motors could go as high as $16,000,000.00.

The FTC's motion to dismiss for failure to state a claim upon which relief can be granted must accordingly be denied. This Court expressly rejects the FTC's assertion that the dealership plaintiffs should be dismissed from this action on the authority of *U.S. v. Miller*, 425 U.S. 435 (1976), since the ownership of the records turned over to General Motors and the circumstances surrounding that disclosure are yet to be determined.

The FTC next argues that this case should be transferred because venue is improperly laid in this District. Venue in civil actions against federal officers and agencies is governed by 28 U.S.C. § 1391(e), which provides that an action may be brought in any judicial district in which (1) a defendant in the action resides; (2) the cause of action arose; (3) any real property involved in the action is situated; or (4) the plaintiff resides if no real property is involved in the action. It is uncontested that the purpose behind this statute is to broaden the number of places where federal officers and agencies can be sued. *Reuben H. Donnelly Corp. v. Federal Trade Comm.*, 580 F.2d 264 (7th Cir. 1978).

The FTC admits that venue is proper in this District for the dealership plaintiffs. This is all that is required to establish venue for all plaintiffs. *Candarini v. Atty. Gen. of the U.S.*, 369 F.Supp. 1132 (E.D. N.Y. 1974); *Holtzman v. Richardson*, 361 F.Supp. 544 (E.D.N.Y. 1973), *rev'd on other grounds*, 484 F.2d 1307 (2d Cir. 1973), *cert. den.*, 416 U.S. 936 (1974); *Natural Resources Defense Council, Inc. v. Tennessee Valley Authority*, 340 F.Supp. 400 (S.D.N.Y. 1971), *rev'd on other grounds*, 459 F.2d 255 (2d Cir. 1972); *Environmental Defense Fund, Inc. v. Corps. of Engineers*, 325 F.Supp. 728 (E.D. Ark. 1970), *aff'd.*, 470 F.2d 289 (8th Cir. 1972), *cert. den.*, 412 U.S. 931 (1973).

Accordingly, this Court will deny the Motion of Defendant Federal Trade Commission to Dismiss or Transfer.

UNITED STATES of AMERICA *v.* PATRICK R. FALTICO*

No. 77-1887. F.T.C. File No. 99-251.

(United States Court of Appeals, Eighth Circuit, November 15, 1978)

1. EVIDENCE SUPPORTED DISTRICT COURT'S CONCLUSION THAT LAWYER AND CORPORATION HAD NEVER HAD AN ATTORNEY-CLIENT RELATIONSHIP, BUT HAD ATTORNEY-CLIENT PRIVILEGE EXISTED, IT WOULD HAVE BEEN FORFEITED BY "CONSTRUCTIVE FRAUD" PRACTICED ON STATE OFFICIALS.

   Evidence, in case commenced by the United States to compel attorney and businessman, to comply fully with subpoena duces tecum requiring him to appear and give a deposition and to bring with him books and records of defunct Illinois corporation in connection with investigation of the Federal Trade Commission of the freezer meat business, supported trial judge's finding that in view of connection between attorney and corporation no attorney-client relationship had ever existed between them and even if there had been an attorney-client privilege with respect to corporation's documents it had been forfeited by "constructive fraud" practiced by corporation and attorney on authorities of state.

2. THAT RELEVANT DOCUMENTS WITHIN ATTORNEY'S EFFECTIVE CONTROL HAD BEEN PLACED IN THE HANDS OF NON-PARTY CORPORATIONS DID NOT PRECLUDE AN ORDER COMPELLING THEIR PRODUCTION; BUT CASE WOULD BE REMANDED FOR FURTHER CONSIDERATION, SINCE COURT WAS NOT CONVINCED THAT RESPONDENT HAD NOT ACTUALLY PRODUCED ALL SUCH EXISTING DOCUMENTS.

   Respondent could be ordered to produce corporation's documents and records that were within his effective control even though they may have been placed in the hands of corporations which were not parties to Government's action to compel compliance with subpoena duces tecum requiring respondent to appear and give deposition and bring with him books and records of defunct Illinois corporation; however, where it was not clear that respondent had not actually produced all of documents that were relevant to Federal Trade Commission's investigation or to Government's judgment for penalties and that they were still in existence and subject to attorney's effective control, case would be remanded for further consideration.

United States filed suit to compel attorney and businessman to comply fully with subpoena duces tecum to file special report called for by the Federal Trade Commission and to collect accrued and accruing per diem penalties for failure of defendant to comply with discovery order of the Commission. The United States District Court for the Western District of Missouri, Russell G. Clark, Jr., provided that satisfactory production of documents be made, and after additional production did not settle dispute between parties, attorney and businessman filed timely notice of appeal. The Court of Appeals, Henley, Circuit Judge, held that: (1) findings of district court to effect that there was no attorney-client relationship between corporation and respondent were

*Reported in 586 F. 2d 1267 (1978).

supported by evidence, and, (2) respondent was properly compelled to produce documents and records that were within his effective control even though they may have been placed in hands of corporations which were not parties to the action.

Affirmed and remanded.

(Syllabus, with substituted captions, taken from 586 F. 2d 1267)

James R. Wyrsch, Kansas City, Mo., for appellant.
Denis E. Hynes, Atty., F.T.C., Washington, D.C., for appellee.

Before GIBSON, *Chief Judge,* HENLEY, *Circuit Judge,* and EISELE, *Chief District Judge.**

HENLEY, *Circuit Judge.*

This is an action commenced by the government in the United States District Court for the Western District of Missouri to compel Patrick R. Faltico, a Kansas City attorney and business man, to comply fully with a subpoena duces tecum requiring him **[1268]** to appear and give a deposition and to bring with him books and records of a defunct Illinois corporation known as Top Value Meats, Inc.[1] Faltico, hereinafter referred to at times as respondent, appeared for the taking of his deposition, was sworn and gave some testimony. However, with respect to the documents demanded by the government he claimed attorney-client privilege and also raised questions about his control over certain of the documents that he had been called upon to produce.

Thereafter the government filed its motion in the district court to compel discovery, as authorized by Fed.R.Civ. P. 37(a). Respondent resisted the motion. After evidentiary hearings were held, the district court granted the government's motion, and this appeal followed.[2]

The controversy arises from the fact that in 1974 the Federal Trade Commission commenced an investigation of business practices engaged in a by a number of corporations which were involved directly or indirectly in what is referred to as the "freezer meat" business. The Commission suspected that the practices to be investigated were prohibited by 15 U.S.C. § 45; the investigation was authorized by 15 U.S.C. § 46. A number of the corporations under investigation operated in the Kansas City metropolitan area; however, the one involved in this particular case, Top Value Meats, Inc., had its principal place of business in Oak Park, Illinois, and operated in the Chicago area. The records in this case and in other cases indicate that

*The Honorable G. Thomas Eisele, Chief United States District Judge, Eastern District of Arkansas, sitting by designation.

[1] The subpoena was issued pursuant to Fed.R.Civ.P. 45(d)(1).

[2] The controversy between the parties was considered first by Senior District Judge William H. Becker who made preliminary findings of fact and conclusions of law. Later, the case was given further consideration by District Judge Russell G. Clark who adopted the findings and conclusions of Judge Becker and entered the order whence comes this appeal.

respondent Faltico had been closely connected with and perhaps in control of a number of the corporations being investigated by the Commission.[3]

In January, 1974 the Commission determined by resolution to embark on the investigation that has been mentioned and to employ compulsory process to obtain necessary information. The investigation was directed at a number of meat companies and other corporations connected with them, and at Mr. Faltico. One of the targets of the investigation was Top Value Meats, Inc. (Top Value), the Illinois corporation.

Top Value was incorporated in 1972 and its president and probably its ostensible principle shareholder was Harold D. Hill, Sr. The company had a number of retail outlets in the Chicago area; it sold meat to consumers on an installment contract basis, and the contracts were discounted with finance companies in the Chicago area with the proceeds of the sales being deposited in a number Illinois bank accounts.

By the fall of 1975 the company was in difficulties with Illinois authorities, and it ceased operations in October of that year. Later in the same year it was dissolved by the Illinois Secretary of State on account of its failure to pay its corporate franchise tax and to file its annual report with the Corporation Division of the office of the Secretary of State.

Prior to the collapse of the company the Commission served upon it an order to furnish a special report as provided by 15 U.S.C. § 46(b) giving detailed information as to its organization, ownership, business [1269] practices and connections with other business enterprises.

Top Value did not comply with that order, and in due course the Commission entered a notice of default that commanded compliance with the original order not later than June 15, 1975. Top Value did not heed that notice and as of June 15, 1975 it became subject to the civil penalty of $100.00 per day provided by 15 U.S.C. § 50.

In mid-September, 1975 the government filed a suit in the United States District Court for the Northern District of Illinois to compel Top Value to file the special report called for by the Commission and to collect the accrued and accruing per diem penalties. 15 U.S.C. §§ 49 and 50.

[3] The Commission's investigation of the freezer meat business and a related investigation by the Department of Justice to determine whether the proceeds of racketeering activities were being invested in that business in violation of 18 U.S.C. § 1962 have produced substantial litigation in the Western District of Missouri and have evoked at least three reported opinions of this court. *Federal Trade Commission* v. *Packers Brand Meats, Inc.*, 562 F.2d 9 (8th Cir. 1977); *In re Faltico*, 561 F.2d 109 (8th Cir. 1977); *Blue Ribbon Quality Meats, Inc.* v. *Federal Trade Commission*, 560 F.2d 874 (8th Cir. 1976). And the instant case is not unrelated to still another Commission case now before us that involves a Missouri corporation. *Top Value Meats, Inc.* v. *Federal Trade Commission*, 586 F.2d 1275 (8th Cir. 1978); the two cases argued the same day and before the same panel of the court.

As stated, the company ceased to operate in October, 1975 and was involuntarily dissolved later in that year. Not surprisingly Top Value did not defend the government's suit, and the government obtained a default judgment enforcing the Commission's order calling for a special report and awarding the civil penalties sought by the government. Thereafter, the government, proceeding under Fed.R.Civ.P. 69(a), called on Harold Hill to supply the special report that the Commission had demanded of Top Value. Mr. Hill failed to do so, and was adjudged to be in civil contempt of the Illinois federal court.

In an effort to purge himself of that contempt Hill advised the court and government counsel that as far as management and control of Top Value were concerned, he was nothing but a figurehead, and that the company was controlled entirely by Faltico either personally or acting through two Missouri corporations that Faltico allegeldy controlled. Those corporations are, or at least were, American Employment Service, Inc. and National Management Systems, Inc., both of Kansas City.

In view of that information the government decided to take the post-judgment deposition of respondent in Kansas City, and the subpoena duces tecum involved in this case was duly served on him. Generally speaking, that subpoena called on respondent to produce for inspection all of the books, records and papers of Top Value that were in his possession or under his control. The production of such records might have been of benefit to the Commission in its investigation of the meat companies, or it might have revealed assets of the dissolved company that could be seized and used to satisfy the monetary judgment that the government had obtained in Illinois. Or the records could have supplied a basis for holding other corporations and individuals, including Faltico, personally liable for the financial obligation of Top Value under the judgment that had been rendered against it.

When respondent appeared for the taking of his deposition he had with him a "legal file" containing some documents relating to Top Value. He offered to submit the contents of that file to the district court for in camera examination; however, with respect to those contents respondent took the position that they were protected from disclosure by the attorney-client privilege, and he did not reveal them to the Assistant United States Attorney who was taking the disposition. As to other documents respondent demanded that the term "control" be defined and indicated that depending on that definition, other relevant documents might or might not be under his control. An impasse having been reached, the government filed its Rule 37(a) motion in the district court.

The district court issued an order on respondent requiring him to show cause why he should not be compeled to comply with the subpoena as far as the production of Top Value documents was concerned. Respondent filed a response to the government's motion, and the government filed replies to that response. Attached to one of the replies was a long affidavit from Harold Hill which set out in great detail what has been stated in substance here already.

At the evidentiary hearing that was held on June 16, 1977 Judge Becker considered the Hill affidavit, the detailed testimony of Hill, and certain exhibits introduced by the government. The respondent did not testify and called no witnesses. It appears, [1270] however, that he did introduce into evidence an affidavit claiming privilege and that he tendered certain documents to the court for in camera inspection.

At the conclusion of the hearing Judge Becker ruled from the bench that in view of the connection between respondent and Top Value no attorney-client relationship had ever existed between them. Alternatively, the trial judge was of the view that if there had ever been an attorney-client privilege with respect to Top Value documents it had been forfeited by what the judge referred to as "constructive fraud" practiced by Top Value and respondent on the authorities of the State of Illinois.

At a later hearing that was held on July 12, 1977 respondent submitted some additional documents to the district court but offered no additional evidence.

The order of Judge Clark from which respondent appeals was entered on August 15, 1977, and it provided that a satisfactory production of documents be made on the afternoon of August 22 in the office of the United States Attorney at Kansas City. Apparently, the taking of the deposition of respondent was to be resumed at that time or thereafter.

The taking of the deposition was resumed on September 9 and respondent produced additional documents. However, his testimony and additional production evidently did not settle the dispute between the parties, and respondent filed a timely notice of appeal from the order of Judge Clark on September 12, 1977.

[1,2]We have given careful consideration to the record in the case, to the briefs of the parties, and to the oral arguments that have been made both in this case and in its related case, No. 77-1799, 586 F.2d 1275.[4] We conclude that the findings of the district court on the issue of attorney-client privilege have substantial evidentiary support and are not clearly erroneous. This case is readily distinguishable factually from *Diversified Industries, Inc.* v. *Meredith*, 572 F.2d 596 (8th

[4] See n. 3, *supra*.

Cir. 1978). We also conclude that no error was committed by the district court in ordering respondent to produce Top Value documents and records that were within his effective control even though they may have been placed in the hands of corporations which are not parties to this action.

However, we are not convinced that Mr. Faltico has not actually produced all of the Top Value documents that are relevant to the Federal Trade Commission's investigation, or to the government's judgment for penalties, and that are still in existence and subject to respondent's effective control.

In the circumstances we hold that the judgment of the district court requiring Faltico to produce all Top Value documents covered by the subpoena and in his possession or under his effective control should be affirmed. We think, however, that the case should be remanded to the district court for further consideration of the question of whether or not respondent has already produced all of the documents falling within the category just mentioned. Upon the filing of our mandate in the district court, that court should inquire of counsel for the government whether it desires to pursue this matter further; if the response is in the affirmative, the district court should set a date for a further hearing, and prior to that hearing counsel for the government should be required to state with some specificity what documents of Top Value it contends are in the possession or under the control of respondent and that he has not produced. If the government's response to the district court's inquiry is in the negative or if no response is forthcoming within a time fixed by the district court, the case may simply be closed.

Affirmed and remanded for further proceedings consistent with this opinion.

TOP VALUE MEATS, INC. et al. *v.* FEDERAL TRADE COMMISSION et al.*

No. 77-1799. F.T.C. File No. 99-236.

(United States Court of Appeals, Eighth Circuit, November 16, 1978)

1. RESPONDENTS' CONTENTION THAT FTC'S INVESTIGATION HAD BEEN SOLELY AND IMPERMISSIBLY UNDERTAKEN AS A MEANS OF DEVELOPING EVIDENCE FOR USE AGAINST THEM IN POSSIBLE CRIMINAL PROSECUTIONS WAS NOT SUPPORTED BY EVIDENCE.

[1276] In action brought by companies, which were engaged in freezer meat business and which had been ordered by Federal Trade Commission, in its investigation to determine whether deceptive practices were being carried on in such business, to file special reports, to enjoin enforcement of report requirements, evidence did not support companies' contention that Commission's investigation had not been undertaken in good faith but rather for sole and impermissible purpose of developing evidence to be used in possible criminal prosecutions of companies and some individuals controlling them.

2. "GUARANTEED'S" APPEAL IN SEVENTH CASE WAS UNTIMELY SINCE PLAINTIFFS IN THE FIRST SIX CASES HAD RECEIVED NO PERMISSION TO AMEND ORIGINAL NOTICES OF APPEAL AND "GUARANTEED'S" TIME TO APPEAL, AS DEFENDANT IN THE SEVENTH CASE, WAS NEVER EXTENDED.

Where, in litigation between six companies engaged in freezer meat business and Federal Trade Commission, six companies filed timely notice of appeal in six cases wherein they had been plaintiffs, but no appeal was taken by first company in seventh case in which it had been a defendant, amended notice, which made first company an appellant in seventh case, was filed after expiration of 60-day appellate period, companies never received any permission from district court or from Court of Appeals to amend their original notice or notices of appeal and first company's time to appeal in seventh case was never extended by district court, first company's appeal in seventh case was untimely.

3. WHERE NO JUDGMENT REGARDING GOVERNMENT'S PRINCIPAL CLAIM IN SEVENTH CASE HAD ACTUALLY BEEN ENTERED AND COMPANY'S COUNTERCLAIM WAS STILL PENDING, "GUARANTEED'S" APPEAL WAS DISMISSED FOR LACK OF JURISDICTION SINCE NO APPEALABLE ORDER EXISTED.

Where, although, in litigation between companies engaged in freezer meat business and Federal Trade Commission, orders entered were broad enough to include and were intended to include principal claim of Government against first company in seventh case, those orders did not dispose of first company's counterclaim in such case and district court made no finding or determination of finality with respect to principal claim in seventh case, order or judgment, if any, in favor of Government in seventh case was not appealable, and thus first company's attempted appeal in seventh case was dismissed for lack of jurisdiction.

*Reported in 586 F.2d 1275 (1978).

4. PACKERS AND STOCKYARDS ACT DID NOT EXEMPT COMPANIES FROM FTC'S INVESTIGATIVE JURISDICTION; SPECIAL REPORT REQUIREMENTS WERE NEITHER UNREASONABLE NOR OVERBROAD; AND FIRMS HAD RECEIVED PROPER NOTICES REGARDING THOSE REQUIREMENTS.

Companies, which were engaged in freezer meat business and which had been ordered by Federal Trade Commission, in its investigation to determine whether deceptive practices were being carried on in such business, to file special reports setting out under oath detailed information concerning their organization, business, conduct, practices, management and relationships with other business enterprises, were subject to investigative jurisdiction of Commission, were not exempt from that jurisdiction by virtue of Packers and Stockyards Act, had received proper and adequate notices of report requirements,which were not unreasonable or overbroad.

5. DISTRICT COURT DID NOT ERR IN CONSOLIDATING CASES AND IN NOT COMPELLING DISCOVERY SOUGHT BY PLAINTIFFS.

[1277] In six separate actions brought by companies, which were engaged in freezer meat business and which had been ordered by Federal Trade Commission, in its investigation to determine whether deceptive practices were being carried on in such business, to file special reports, seeking to enjoin enforcement of report requirements, no error occurred in consolidating cases and in not compelling Commission to provide detailed discovery sought by companies.

6. DISTRICT COURT WAS NOT JUSTIFIED IN AWARDING PENALTIES TO THE COMMISSION PURSUANT TO APPLICABLE STATUTE, WHERE GOVERNMENT, IN THE FIRST SIX CASES, HAD NOT SOUGHT PENALTIES IN ITS OWN NAME OR INTERVENED IN CONNECTION WITH FTC'S COUNTERCLAIMS IN THOSE ACTIONS.

Since companies, which were engaged in freezer meat business, and which had been ordered by Federal Trade Commission, in its investigation to determine whether deceptive practices were being carried on in such business, to file special reports, had not been sued by Government in its own name for per diem penalties after their noncompliance with report requirements within 30 days and since Government had not intervened in actions brought by companies against Commission to enjoin enforcement of report requirements in connection with counterclaims filed by Commission seeking collection of per diem penalties, district court was not justified in awarding penalties to Commission on basis of applicable statute.

7. PRESCRIBED CONGRESSIONAL PROCEDURES FOR IMPOSING AND COLLECTING STATUTORY PENALTIES MUST BE ADHERED TO STRICTLY.

When Congress imposes penalties and prescribes means whereby and conditions under which those penalties are to be collected, there must be strict compliance with procedures prescribed by Congress.

8. FTC MUST COMPLY WITH APPLICABLE STATUTORY NOTICE AND DELAY REQUIREMENTS TO MAINTAIN IN ITS OWN NAME A SUIT SEEKING PER DIEM PENALTIES FOR FAILURE TO TIMELY FILE SPECIAL REPORT WITH THE COMMISSION.

Federal Trade Commission cannot maintain in its own name, either by direct action or by way of counterclaim, a suit for statutory per diem penalties against a party failing to file special report with Commission within 30 days after notice of such default without complying with applicable statutory notice and delay requirements.

Companies, which were engaged in freezer meat business and which had been ordered by Federal Trade Commission, in its investigation to determine whether deceptive practices were being carried on in such business, to file special reports, filed six separate suits seeking to enjoin enforcement of report requirements. Commission answered complaints and filed counterclaim seeking enforcement of its orders and collection of per diem statutory penalties. United States commenced another action in its own names against first company to enforce Commission's order and to collect per diem penalties. After consolidating first six cases, the United States District Court for the Western District of Missouri, William H. Becker, Senior Judge, entered judgement from which companies appealed. The Court of Appeals, Henley, Circuit Judge, held that:(1) first company's appeal in seventh case was untimely and, moreover, there was not an appealable order in that case; (2) companies were subject to investigative jurisdiction of Commission, were not exempt from that jurisdiction by virtue of Packers and Stockyards Act, and received proper and adequate notices of report requirements, which were not unreasonable or overbroad, and (3) Commission could not maintain in its own name, either by direct action or by way of counterclaim, a suit for statutory per diem penalties because of companies' failure to comply with report requirements within 30 days of notices of default given Commission's noncompliance with notice and delay requirements of another statute.

Appeal dismissed in part, affirmed in part, reversed in part and cause remanded.

(Syllabus, with substituted captions, taken from 586 F.2d 1275)

Patrick Faltico of *Faltico, Bertram, Bony & Associates,* Kansas City, Mo., argued, for appellant; *James Wyrsch,* Kansas City, Mo., on brief.

Denis E. Hynes, Atty., Federal Trade Commission, Washington, D.C., argued, for appellees.

Ronald S. Reed, Jr., U.S. Atty., *E. Eugene Harrison,* Asst. U.S. Atty., Kansas City, Mo., *John H. Shenefield,* Asst. Atty. Gen. Antitrust Div., *Charles R. McConachie,* Chief, Consumer Affairs Section, *James A. Calderwood,* Atty., Consumer Affairs Section, U.S. Dept. of Justice, Wshington, D.C., on brief, for appellees; *Michael N. Sohn,* Gen. Counsel, *Gerald P. Norton,* Deputy Gen. Counsel, *W. Dennis Cross,* Asst. Gen. Counsel, F.T.C., Washington, D.C., of counsel.

Before GIBSON, *Chief Judge,* HENLEY, *Circuit Judge,* and EISELE, *Chief District Judge.*†

HENLEY, *Circuit Judge.*

This is an appeal from a summary judgment rendered by the United States District Court for the Western District of Missouri (Senior District Judge William H. Becker) in favor of the Federal Trade Commission in litigation between the Commission and six corporations which are or have been engaged in the freezer meat

†The Honorable G. Thomas Eisele, Chief United States District Judge, Eastern District of Arkansas, sitting by designation.

business in the Kansas City area.[1] The corporations [1278] are identified as Top Value Meats, Inc.; Guaranteed Quality Meats, Inc.; Twin City Beef Company; Prime Meats, Inc.; Freezer World, Inc.; and Midwestern Meat Processors, Inc.

In early 1974 the Commission, acting under the authority of § 6 of the Federal Trade Commission Act, 15 U.S.C. § 46, launched an investigation to determine whether fraudulent and deceptive practices were being carried on in the freezer meat industry in violation of § 5 of the Act, 15 U.S.C. § 45. The corporations above mentioned were subjects of the investigation, and the investigation extended to other corporations and to an individual, Patrick R. Faltico, a Kansas City lawyer and business man who has been closely connected with the freezer meat business in Missouri and Illinois.[2]

In late 1974 the Commission called on the meat companies that have been mentioned to file special reports, as provided by § 6(b) of the Act, setting out under oath detailed information with respect to the organization, business, conduct, practices, and management of the respective meat companies and also describing their relationships with other business enterprises.

One of the companies, Guaranteed Quality Meats, Inc. (Guaranteed), filed a motion with the Commission to quash the order calling for a special report from Guaranteed. The Commission denied that motion. None of the other companies sought any administrative relief from the report requirements, and none of the six companies complied with the requirements within the time prescribed by the Commission.

In due course the Commission issued to the respective companies notices of default demanding that they comply with the report requirements within thirty days. The companies did not comply with those notices, and their failure triggered at the end of the thirty day period the per diem penalties of $100.00 per day prescribed by the third paragraph of § 10 of the Act, 15 U.S.C. § 50.

Before any government action had been taken to enforce the report requirements or to collect accrued and accruing penalties the meat

[1] The "freezer meat" business which involved among other things the sale of meat to be placed in home freezers is discussed in some detail in *Bruhn's Freezer Meats of Chicago, Inc.* v. *United States Dept. of Agriculture*, 438 F.2d 1332 (8th Cir. 1971).

[2] Mr. Faltico is the appellant in the case of *United States* v. *Faltico*, 586 F.2d 1267, which is related to this case and which was known as Top Value Meats, Inc. That case and this one were argued together and were heard by the same panel of the court.

We note that investigations of the freezer meat industry by the Commission and by the Department of Justice in recent years have produced a good deal of litigation in the Western District of Missouri, and there have been appeals to this court. *See Federal Trade Commission* v. *Packers Brand Meats, Inc.*, 562 F.2d 9 (8th Cir. 1977); *In re Grand Jury Subpoena for Patrick Faltico*, 561 F.2d 109 (8th Cir. 1977); *Blue Ribbon Quality Meats, Inc.* v. *Federal Trade Commission*, 560 F.2d 874 (8th Cir. 1977). Those cases have involved efforts on the part of the meat companies to avoid disclosures demanded by the Commission and by the federal grand jury for the Western District of Missouri. The grand jury and the Department of Justice have been interested in the question of whether the proceeds of racketeering activities have been invested in the interstate meat industry in violation of 18 U.S.C. § 1962.

companies filed six separate suits in the district court seeking to enjoin the enforcement of the report requirements. The defendants in the cases were the Commission itself, the individual members of the Commission and the Commission's staff attorney who was handling the investigation at the time. We will refer to the defendants collectively as the "Commission."[3]

The Commission answered the complaints and denied that the plaintiffs were entitled to any relief. The Commission also filed counterclaims seeking enforcement of its orders and the collection of the $100.00 per day penalties prescribed by § 10 of the Act.

For a reason that is not material here, the United States commenced an action in its own name against Guaranteed to enforce the Commission's order and to collect [1279] the per diem penalties.[4] Guaranteed answered and denied that the government was entitled to any relief and also filed a counterclaim for damages based on alleged abuse of process.

After various preliminary proceedings, the cases, or at least the first six of them, were finally submitted to the district court on motions for summary judgment pursuant to Fed.R.Civ.P. 56.[5]

Summary judgment in favor of the Commission was granted on November 27, 1976. The complaints of the meat companies were dismissed, and the Commission was granted judgment on its counterclaims. The judgments in favor of the Commission were to the effect that the meat companies were to comply with the report requirements by a date set by the court and were to pay the § 10 per diem penalties.

[1] The meat companies sought post-judgment relief on a number of grounds. One of their contentions was that the Commission's investigation had not been undertaken in good faith but rather for the sole and impermissible purpose of developing evidence to be used in possible criminal prosecutions of the meat companies and some of the individuals in control of them, including Faltico and John Patrick Cuezze who was the president and ostensibly the sole stockholder of Guaranteed.

Judge Becker held an evidentiary hearing on the particular contention just mentioned and found it to be without merit. We find it convenient at this point to say that the judge's finding has substantial evidentiary support, is not clearly erroneous, and is upheld by us. Other questions in the case will be considered in more detail.

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[3] The six original cases are identified by the following district court docket numbers: 75CV350-W-3; 75CV351-W-3; 75CV352-W-4-3; 75CV353-W-3; 75CV354-W-2-3; and 75CV355-W-3.

[4] That case was docketed in the district court as 75CV578-W-2-3.

[5] It is not clear to us from the Appendix supplied by the parties whether the United States ever filed a motion for summary judgment in the suit that it had commenced against Guaranteed.

The post-judgment motions of the meat companies were finally overruled by the district court on July 1, 1977. Since the government and one of its agencies were involved, the companies had sixty days within which to appeal to this court. Fed.R.App.P. 4(a). That sixty day period expired on August 30, 1977.

On that day the meat companies filed timely notice of appeal in the cases wherein they had been plaintiffs. But, for some reason no appeal was taken by Guaranteed in the case in which it had been a defendant.

On September 9 the meat companies, including Guaranteed, filed an amended notice of appeal for the purpose of making Guaranteed an appellant in the seventh case in which case it had been the defendant.

The amended notice was filed after the expiration of the sixty day appellate period. There is no suggestion that the meat companies ever received any permission from the district court or from this court to amend their original notice or notices of appeal, and there is no suggestion that Guaranteed's time to appeal in No. 75CV578-W-2-3 was ever extended by the district court or that any extension of time was ever requested.

I.

The Federal Trade Commission Act was passed originally in 1914 and appears as 15 U.S.C. § 41 *et seq.* The Act has been amended frequently, and it was substantially amended in 1973 and again in 1975.[6] Those amendments taken together substantially broadened the Commission's regulatory jurisdiction and also increased the powers of the Commission to enforce the provisions of the Act and of its orders in actions prosecuted or defended in its own name without recourse to the Department of Justice.

[1280] As far as jurisdiction is concerned, the original Act limited the Commission's jurisdiction to business enterprises that were engaged "in interstate or foreign commerce." The 1975 amendments extended the Commission's jurisdiction to businesses, the activities of which were either "in" or which "affected" interstate or foreign commerce. P.L. 93-637, § 201(a), 15 U.S.C. § 45(a) (1978).[7]

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[6] The 1973 amendments appear as Title IV of the Trans-Alaska Pipeline Authorization Act. Act of November 16, 1973, P.L. 93-153, 87 Stat. 576, § 408.

The 1975 amendments appear as Title II of the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act of 1975, Act of January 4, 1975, P.L. 93-637, 88 Stat. 2183, § 201 *et seq.*

[7] We have already referred adequately to the provisions of § 5 which prohibit unfair trade practices, to the investigatory powers of the Commission under § 6, and to the per diem penalties that may be incurred under § 10. We will point out that the Commission has never filed a § 5 complaint against any of the meat companies and has never issued a cease and desist order against any of them.

II.

[2, 3] We take up, first, the belated attempt of the meat companies to join Guaranteed as an appellant in the seventh case in which the government was plaintiff and Guaranteed was the defendant and counter-claimant. In view of the procedural chronology that has been set out, we consider that Guaranteed's appeal in the seventh case is untimely. Moreover, we do not think that we have an appealable order in that case.

The counterclaim was based on alleged abuse of process by the government and sounded in tort. Prior to filing the counterclaim Guaranteed made no effort to obtain administrative relief as required by the Federal Tort Claims Act, 28 U.S.C. § 2671 *et seq.*, specifically § 2675. When the government moved to dismiss the counterclaim for that reason, the district court severed the counterclaim from the principal claim and gave the counterclaim a separate docket sub-number. And the district court also called on Guaranteed to show cause why the counterclaim should not be dismissed.

The order just mentioned was entered on October 26, 1976, and as far as we can tell from what is before us, that was the last order entered in the seventh case. We are advised that the counterclaim in that case is still pending under its docket sub-number, and we are not advised that any judgment on the principal claim of the government in that case has ever actually been entered. The principal order of the district court which produced this appeal originally was filed in late November, 1976. That order refers specifically to the first six cases, including the one in which Guaranteed was plaintiff, but it makes no mention of the seventh case in which Guaranteed was the defendant.

We assume, however, at least for purposes of discussion, that the November, 1976 order and the later order that was entered in 1977 were broad enough to include and were intended to include the principal claim of the govenment against Guaranteed in the seventh case. However, those orders did not dispose of Guaranteed's counterclaim, and the district court made no finding or determination of finality with respect to the principal claim as provided by Fed.R.Civ.P. 54(b). Thus, the order or judgment, if any, in favor of the government in the seventh case is not appealable. 9 Wright & Miller, Federal Practice & Procedure, § 2392, pp. 304-05.

So, Guaranteed's attempted appeal in the seventh case will be dismissed for lack of jurisdiction.

III.

We now consider the first six cases in which the meat companies are plaintiffs and the Commission is the defendant and counterclaimant.

In the district court the companies advanced many contentions in opposition to the report requirements of the Commission, and they advance esentially the same contentions here. Judge Becker dealt with those contentions in a well organized, well reasoned, and detailed opinion with which we find ourselves in agreement.

[4] Specifically, we agree with the district court that the meat companies were [1281] subject to the investigative jurisdiction of the Commission, that they were not exempt from that jurisdiction by virtue of the Packers & Stockyards Act, *cf. Blue Ribbon Quality Meats, Inc.* v. *Federal Trade Commission*, 560 F.2d 874, 875-76 (8th Cir. 1977), that they received proper and adequate notice of the report requirements, and that those requirements were not unreasonable or overbroad.

[5] As to procedure, we are satisfied that the district court did not err in consolidating the cases and in not compelling the Commission to provide the detailed discovery sought by the companies.

The ultimate question is whether the district court erred in granting summary judgment in favor of the Commission. The district court was required, or course, to view the case in the light most favorable to the companies, to give them the benefit of all reasonable inferences favorable to them, and to deny summary judgment unless satisfied that the record established beyond controversy that the case presented no genuine issue as to a material fact and that the Commission was entitled to judgment as a matter of law. *Weber* v. *Towner County*, 565 F.2d 1001 (8th Cir. 1977), and cases cited.

Apart from the question of the motivation of the Commission in undertaking the investigation, which question the district court disposed of properly, and apart from any question of the propriety of awarding the Commission judgment for the per diem penalties, which question we will discuss presently, we are satisfied that the case presented no genuine issue as to any material fact, and that summary judgment in favor of the Commission was proper. In our opinion the district court was correct in dismissing the complaints of the meat companies, and in ordering those companies to submit the reports that the Commission had required.

IV.

In the course of the argument on appeal we raised the question of whether the district court erred in awarding the § 10 penalties to the Commission on its counterclaims. That question had not been raised in the district court and was not discussed in the original appellate briefs. After the arguments the Commission sought leave to file a supplemental brief. We granted that leave; the Commission filed its

supplemental brief, and the meat companies filed a brief in reply. Those briefs have been considered.

The problem arises from the fact that while the suits filed by the meat companies were defended and while the Commission's counterclaims were prosecuted by counsel for both the Commission and the Department of Justice (including the United States Attorney for the Western District of Missouri and members of his staff) working in cooperation, the government itself has never been a party to the first six cases.

The third paragraph of § 10 of the Act as amended by the Act of January 4, 1975, P.L. 93-637, Title II, § 203(c), 88 Stat. 2199, contains its own enforcement provision and is as follows:

> If any persons, partnership, or corporation required by sections 41 to 46 and 47 to 58 of this title to file any annual or special report shall fail so to do within the time fixed by the Commission for filing the same, and such failure shall continue for thirty days after notice of such default, the corporation shall forfeit to the United States the sum of $100 for each and every day of the continuance of such failure, which forfeiture shall be payable into the Treasury of the United States and shall be recoverable in a civil suit in the name of the United States brought in the case of a corporation or partnership in the district where the corporation or partnership has its principal office or in any district in which it shall do business, and in the case of any person in the district where such person resides or has his principal place of business. It shall be the duty of the various United States attorneys, under the direction of the Attorney General of the United States, to prosecute for the recovery of forfeitures. The costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States.

[6] Since the government did not sue for the penalties in its own name, except in the seventh case, and since it did not intervene in the first six cases in connection with the counterclaims filed by the Commission, it is clear to us that the district court was not justified in awarding the penalties to the Commission on the basis of § 10 of the Act, as amended.

Some encouragement for the Commission is to be found in the 1975 amendment to § 16 of the Act. Act of January 4, 1975, *supra*, § 204(a). Prior to the adopotion of the 1973 and 1975 amendments to the Act, § 16 simply did not apply to § 10 per diem penalties. The original section provided that penalties incurred under § 5(*l*) or § 14 of the Act should be recovered at the suit of the Attorney General upon receipt of a certification from the Commission that it had reason to believe that penalties under one or both of the sections just mentioned had been incurred. In *United States* v. *St. Regis Paper Co.*, 355 F.2d 688 (2d Cir. 1966), it was held that a certification to the Attorney General by the Commission was a jurisdictional prerequisite

to suit by the former, and that the Attorney General had no right to file suit for the penalties in the absence of such certification.

Amended § 16 is broader than the original section. As now written, § 16(a)(1) provides:

> (a)(1) Except as otherwise provided in paragraph (2) or (3), if—
> (A) before commencing, defending, or intervening in, any civil action involving this chapter (including an action to collect a civil penalty) which the Commission, or the Attorney General on behalf of the Commission, is authorized to commence, defend, or intervene in, the Commission gives written notification and undertakes to consult with the Attorney General with respect to such action; and
> (B) the Attorney General fails within 45 days after receipt of such notification to commence, defend, or intervene in, such action;
> the commission may commence, defend, or intervene in, and supervise the litigation of, such action and any appeal of such action in its own name by any of its attorneys designated by it for such purpose.

Counsel for the Commission and for the Department of Justice concede, as they must, that there was no literal compliance with the notice and forty-five day delay requirements of amended § 16. They argue, however, that this noncompliance should not prohibit the Commission from collecting the penalties on the basis of its counterclaims. Counsel say that the noncompliance was not of jurisdictional magnitude that there was in fact substantial compliance with § 16(a)(1) in that the Department of Justice was well aware of what was going on, and that the counterclaims were prosecuted jointly by counsel for the Commission and counsel for the Department. It is contended that to reverse the district court's awards would be to elevate form over substance, which should not be done.

[7] The trouble with that argument is that we are concerned here with statutory penalties, and statutes imposing such penalties should be construed with some strictness. We think that when Congress imposes penalties and prescribes the means whereby and the conditions under which those penalties are to be collected, there must be strict compliance with the procedures prescribed by Congress. *Cf. United States* v. *St. Regis Paper Co., supra.*

Counsel for the Commission profess and should possess expertise in Commission matters, including legislation affecting the Commission and litigation which involves or may affect the Commission in the enforcement of the Act. Counsel will not be heard to say that they were not familiar with the provisions of § 16(a)(1). The Commission, as a government agency, had sixty days within which to answer the complaints and within which to file such counterclaims as [1283] might be required or proper. In this case it should have been easy for

the Commission to comply with the requirements of § 16(a)(1). Had the Commission done so, the Attorney General could have decided either to intervene in the cases and claim the penalties involved on behalf of the government itself, or he could have decided to stay out of the litigation, in which case the filing of the counterclaims by the Commission would have been appropriate. The notice was not given; and the government did not intervene in the original case or file any suits of its own except the seventh case in which Guaranteed was the defendant.

Almost sixty years ago, a corporate taxpayer filed a suit against the United State in the Court of Claims seeking an adjudication of its federal income tax liabilities. The suit was filed without the taxpayer having paid the assessed taxes and claimed refunds as the Internal Revenue Code required, and still requires. The Court of Claims dismissed the complaint, and its action was affirmed by the Supreme Court in an opinion written by Justice Holmes, who said: "Men must turn square corners when they deal with the Government. If it attaches even purely formal conditions to its consent to be sued those conditions must be complied with. . . ." *Rock Island, Arkansas & Louisiana R.R. Co.* v. *United States,* 254 U.S. 141, 143, 41 S.Ct. 55, 56, 65 L.Ed. 188 (1920).

[8] Here, the question is whether the Commission can maintain in its own name, either by direct action or by way of counterclaim, a suit for per diem penalties imposed under § 10 of the Act without compliance with the notice and delay requirements of § 16(a)(1). We answer that question in the negative.

In our view, where dealings between the government or one of its agencies, on the one hand, and individuals or corporations, on the other hand, are involved, the obligation "to turn square corners" or "to turn corners squarely" is not unilateral. It rests on the government as well as on the individual with whom or the entity with which the government has dealt.

To sum up: The attempted appeal by Guaranteed in the case that was docketed in the district court as No. 75CV578-W-2-3 is dismissed. In the original six cases the judgment of the district court is affirmed to the extent that it dismisses the complaints of the meat companies and to the extent that it orders those companies to comply with the special report requirements of the Commission.[8] To the extent that the judgment of the district court on the Commission's

[8] The original period fixed by the district court for the filing by the meat companies of the reports called for by the Commission has long since expired. Assuming that the reports were not in fact filed during the prescribed period, and assuming further that the Commission is still interested in having the reports, the district court will be free to prescribe a new filing period if requested to do so by the Commission. We note, however, that it was rather strongly indicated in the arguments before us that the Commission is no longer interested in receiving the reports, and that all that is actually involved in the litigation at this time is the liability of the meat companies for the per diem penalties.

counterclaims orders the meat companies to pay the § 10 penalties to the Commission, the judgment is reversed without prejudice to future appropriate action.

Appeal dismissed in part. Judgment of district court affirmed in part and in part reversed and cause remanded for further proceedings not inconsistent with this opinion.

EXXON CORPORATION v. FEDERAL TRADE COMMISSION et al.*

Civ. A. No. 78-0530. F.T.C. Docket No. 8934.

(United States District Court, District of Columbia, November 17, 1978)

1. POSSIBILITY OF UNCOVERING CONTROVERTING FACTS REGARDING THE THOROUGHNESS OF AGENCY'S RECORDS SEARCH DID NOT PROVIDE PLAINTIFF WITH GROUND FOR FOIA DISCOVERY.

   Plaintiff in Freedom of Information was not entitled to discovery on the basis of the possibility that it might find facts which would controvert the evidence submitted by the agency as to the thoroughness of the search which had been made of the agency's records.

2. ADEQUACY OF AGENCY'S SEARCH FOR RESPONSIVE RECORDS WAS SUFFICIENTLY DEMONSTRATED BY FTC SECRETARY'S AFFIDAVIT DETAILING THE METHOD AND SCOPE OF THE SEARCH.

   [1089] Affidavit of FTC secretary to the effect that upon the request for documents being received, she directed the Information and Privacy Acts branch of the office to commence diligent and complete search, that all the offices which could have been in possession of responsive documents were sent copies of the request with instructions to search for responsive documents, that all records in the possession of each commissioner were completely searched, and that all records in the possession of bureau of competition, the office of general counsel, and the office of secretary were searched was sufficient to demonstrate the adequacy of the agency's search for responsive records.

3. COURT HAS DISCRETION TO FOREGO DISCOVERY AND DECIDE AN FOIA CASE ON THE BASIS OF REASONABLY DETAILED AGENCY AFFIDAVITS SUBMITTED IN GOOD FAITH, REGARDLESS OF WHETHER AFFIDAVITS ASSERT THAT IDENTIFIED DOCUMENTS ARE EXEMPT OR THAT ALL IDENTIFIABLE DOCUMENTS HAVE BEEN PRODUCED.

   In a Freedom of Information Act case, the court has discretion to forego discovery and decide the case on the basis of reasonably detailed, explanatory affidavits submitted by the agency in good faith; this is true whether the affidavit avers that identified documents are exempt or whether it avers that all identifiable documents have been produced.

4. WAIVER OF ATTORNEY WORK PRODUCT PRIVILEGE RESULTING FROM ASSERTING PARTY'S ACTIONS MAY ALSO CONSTITUTE A WAIVER OF FOIA'S EXEMPTION FOR INTERAGENCY AND INTRA-AGENCY MEMORANDA.

   The attorney work product privilege can be waived as result of actions of the party seeking to assert it; waiver of the work product privilege may amount to waiver of the Freedom of Information Act exemption for interagency and intra-agency memoranda.

5. APPLICATION OF EXEMPTION FOR INTRA-AGENCY AND INTERAGENCY MEMORANDA IN AN INDEPENDENT FOIA ACTION IS NOT AFFECTED BY PARTICULAR CLAIMS OF A PARTICULAR LITIGANT RELATED TO A PARTICULAR LAWSUIT.

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* Reported in 466 F.Supp. 1088 (1978).

The particular claims of a particular litigant related to a particular lawsuit did not affect the application of the exemption for intra-agency and interagency memoranda in an independent Freedom of Information Act action.

6. PLAINTIFF WAS NOT ENTITLED TO DISCOVERY, SINCE SOUGHT INFORMATION RELATING TO ITS CLAIM THAT FTC HAD "WAIVED" FOIA EXEMPTION WAS IRRELEVANT.

Since information which plaintiff in Freedom of Information Act action sought to discover from the agency with respect to its claim that the agency "waived" one of the Freedom of Information Act exemptions would be irrelevant to that exemption, the plaintiff was not entitled to discovery.

7. COLLATERAL ATTACK, SUCH AS PLAINTIFF'S CLAIM THAT IT WAS ENTITLED TO HAVE AFFECTED DOCUMENTS PLACED ON THE PUBLIC RECORD, SHOULD BE PURSUED THROUGH ADMINISTRATIVE APPEAL PROCEDURRES, RATHER THAN THROUGH AN FOIA ACTION.

If plaintiff in Freedom of Information Act action believed that special circumstances of which case in conjunction with the FTC regulations on ex parte communications entitle it to have some or all of the affected documents placed on the public record, the proper way to pursue that claim was to follow the administrative appeal procedures laid down by Congress and the FTC; the Freedom of Information Act was not intended to be used as an avenue for that type of collateral attack.

8. THE SPECIFIC, DETAILED EXPLANATIONS OF LEGALLY RELEVANT FACTS NECESSARY TO ENABLE AN FOIA DEFENDANT TO PREVAIL ON SUMMARY JUDGMENT WERE LACKING IN FTC'S SUPPORTING AFFIDAVIT.

Supporting affidavit which did not offer any systematic, detailed explanation of which documents were supposed to fall under the deliberative process theory and which were supposed to fall into the work product theory and which were to fall under both lacked a specific, detailed explanation of legally relevant facts necessary to enable the agency to prevail on summary judgment under Freedom of Information Act action.

9. WHILE PROTECTING PREDECISIONAL, DELIBERATIVE AGENCY MEMORANDA, FOIA DOES NOT EXEMPT FROM DISCLOSURE SEGREGABLE PORTIONS OF FACTUAL MATERIAL WHICH WOULD NOT EXPOSE THE DELIBERATIVE PROCESS, OR POSTDECISIONAL MEMORANDA, INCLUDING COMMUNICATIONS EXPLAINING A FINAL AGENCY DECISION.

Predecisional, deliberative memoranda of an agency are privileged under the Freedom of Information Act, while postdecisional memoranda, including communications designed to expand a decision already made, are not exempt, nor are segregable portions of factual material which would not expose the deliberative process.

10. NONE OF THE PARAGRAPHS IN DOCUMENT REFLECTING COMMISSION'S DECISION ON COMPLAINT COUNSEL'S REQUEST FOR JUDICIAL SUBPOENA ENFORCEMENT IS ENTITLED TO EXEMPTION FROM MANDATORY FOIA DISCLOSURE.

Paragraphs of document reflecting a decision of the FTC on request of complaint counsel for judicial enforcement of subpoena which consisted entirely of factual material which did not intrude on the FTC's deliberative process, which reflected the final decision of the Commission, and thus were postdecisional, and which reflected the reasons for each individual commissioner's vote were not exempt from disclosure under the Freedom of Information Act as part of an intra-agency memorandum.

11. SINCE COMMISSION ORDER SUPPORTING COUNSEL'S SUBPOENA ENFORCEMENT REQUEST CONSTITUTED A FINAL COMMISSION OPINION, RECORD OF VOTES CAST INCORPORATED INTO THAT ORDER WAS NOT EXEMPTED BY FOIA DELIBERATIVE PROCESS PRIVILEGE.

[1090] Order of the FTC supporting request of complaint counsel for judicial enforcement of subpoenas represented a final opinion by the Commission and was not exempt as an intra-agency memoranda under the deliberative process privilege for the record of the votes cast had been incorporated into the final order.

12. MATERIAL, PRIVILEGED UNDER FOIA, LOSES ITS PRIVILEGED CHARACTER WHEN INCORPORATED INTO A FINAL COMMISSION OPINION.

The incorporation of what might otherwise be privileged material into a final opinion of an agency order causes that material to lose its privileged character under Freedom of Information Act.

13. FOIA ATTORNEY WORK PRODUCT PRIVILEGE EXEMPTS FROM DISCLOSURE ECONOMIC REPORT DISCUSSING TACTICS, STRATEGIES, AND OPTIONS RELATING TO FTC'S ANTITRUST ADJUDICATION, WHICH WAS PREPARED BY EXPERT CONSULTANTS AT THE DIRECTION OF AND IN AID OF FTC ATTORNEYS.

Economic report, which was prepared by expert consultants at the direction of and for the guidance of Federal Trade Commission in connection with antitrust investigation and which discussed a large range of tactical and strategic issues and options relating to presentation of the antitrust case was privileged attorney work product and exempt from mandatory disclosure of the Freedom of Information Act.

Defendant in antitrust action brought by the FTC filed Freedom of Information Act action against the FTC. The District Court, Oberdorfer, J., held that: (1) plaintiff was not entitled, at this time, to discovery to determine if it could find any facts which would indicate the FTC had not disclosed all responsive documents; (2) documents which reflected the FTC decision on a particular order and the reasons why various commissioners voted as they did was not exempt from disclosure as an intra-agency memorandum, but (3) economic report prepared by expert consultants at the direction of and for the guidance of FTC lawyers was privileged attorney work product and thus exempt from disclosure under the Freedom of Information Act.

Order accordingly.

(Syllabus, with substituted captions, taken from 466 F.Supp. 1088)

[1090] *William Simon, John S. Kingdon, Howrey & Simon* Washington, D.C., for plaintiff.

Mark Kurzmann, U.S. Dept. of Justice, Washington, D.C., for defendants.

MEMORANDUM

OBERDORFER, *District Judge.*

This case arises under the Freedom of Information Act ("FOIA").[1] Plaintiff Exxon requested documents from the Federal Trade Commission ("FTC") relating to an ongoing FTC adjudicative proceeding in which Exxon is a defendant. Plaintiff invokes this Court's jurisdiction pursuant to 5 U.S.C. § 552(a)(4)(B), challenging the thoroughness of the FTC's search for responsive documents and the FTC's refusal to disclose certain admittedly responsive material it does possess.

I. *Findings of Fact*

On July 18, 1973, the FTC issued a complaint against, *i.a.*, Exxon Corporation (the "*Exxon* case"), alleging that anticompetitive conditions in the petroleum industry violate Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45 (1976).[2] The FTC has asserted without contradiction by plaintiff that the *Exxon* case is the largest case ever brought by the Commission. To aid the FTC in the prosecution of the *Exxon* case, the Commission's staff has retained a number of economic consultants to provide advice and assistance in developing litigation strategy and designing the effective use of resources devoted to the case. Among the products of this collaboration is a report prepared by a panel of economists (the "Final Economic Report"), described by the FTC as containing an "in-depth evaluation of aspects of the theory of the case and the evidence supporting these aspects, discussions of possible future litigation strategies, and areas of possible inquiry for further economic analysis." Document #12, defendants' index.

The *Exxon* case is currently in the stage of pretrial discovery. On April 17, 1978, Exxon filed a motion with the administrative law judge in that case for issuance of a subpoena *duces tecum* to direct complaint counsel to produce the Final Economic Report. Administrative Law Judge Berman denied Exxon's motion on the grounds that the economic report, containing assessments of strategy, evaluations and recommendations about theory development and discovery, was clearly attorney work product and therefore privileged.[3] Order of June 2, [1091] 1978, FTC Docket No. 8934, Berman, Administrative Law Judge.

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[1] 5 U.S.C. § 552 (1976).

[2] *In the Matter of Exxon Corporation et al.*, FTC Docket No. 8934.

[3] Exxon also requested, by separate motion, issuance of a subpoena *ad testificandum* directed to Darius Gaskins, former head of the Commission's Bureau of Economics and the Commission official responsible for employing the economists who prepared the Final Economic Report, requiring him to appear for a deposition. Exxon asserted that it sought to depose Mr. Gaskins in order to determine facts relating to the circumstances surrounding development of the Final Economic Report. Judge Berman denied Exxon's motion for the subpoena *ad testificandum*, observing that "Respondents may not obtain by deposition what they are not entitled to through subpoena of documents." Order of June 2, 1978, p. 5, FTC Docket No. 8934, Berman, Administrative Law Judge.

Prior to the filing of its motion with the administrative law judge to obtain discovery of the Final Economic Report, Exxon, through counsel, had made a request to the FTC under FOIA for three categories of documents regarding the *Exxon* case or the issues of that case:

> All documents which constitute, refer or relate to any oral or written communication . . . during the period January 1, 1977, to the date hereof
>
> (a) between any Commissioner of the Federal Trade Commission . . . or any member of such Commissioner's staff, and any Federal Trade Commission employee . . .
>
> (b) between any Commissioner of the Federal Trade Commission . . . or any member of such Commissioner's staff, and any private party . . .
>
> (c) between any employee of the Federal Trade Commission who is directly or indirectly engaged in the pending FTC Docket No. 8934 adjudicative proceeding and any private party. . ..[4]

The FTC granted partial access to the documents responsive to Exxon's request.[5] Exxon appealed the partial denial to the General Counsel of the Federal Trade Commission. The General Counsel released additional documents (or portions thereof) and advised Exxon that the remaining documents (or portions thereof) were being withheld pursuant to exemptions 5, 7(A) and 7(D) of FOIA.[6]

As a result of Exxon's October 25, 1977 FOIA request, the FTC located approximately 2,000 pages of responsive documents; of these, approximately 1,200 pages are on public record. Of the remaining 800 responsive pages, the FTC has released approximately 425 pages, or approximately 53% of the responsive pages located that are not on the public record.

On March 24, 1978, Exxon filed the present complaint with this Court for injunctive relief, challenging the FTC's claims to exemption for the responsive documents withheld in whole or in part, including the Final Economic Report.

Defendants have provided an index of the 64 documents withheld in whole or in part, describing the portions withheld and the exemptions claimed.

Defendants have also produced an affidavit by Carol Thomas, Secretary of the Commission, describing and attesting to the adequacy of the FTC's search for responsive documents, and an affidavit by Roger Pool, complaint counsel in the *Exxon* case, further explaining defendants' reasons for claiming each exemption.

The index and affidavits provided by defendants are relatively detailed and nonconclusory. For example, document #2 is described in defendants' index as follows:

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[4] Letter dated October 25, 1977. This request was modified, pursuant to an understanding between the parties, to exclude communications with Environmental Impact Statement consultants, communications with *Exxon* case respondents and communications with a computer company with which the FTC has an ongoing contract.

[5] Letter dated November 10, 1977, from Carol Thomas, Secretary of the Commission.

[6] Letters dated January 10 and 13, 1977, from Michael Sohn, General Counsel of the Commission.

(2) Undated. *From* economist. *To Exxon* panel and FTC staff. Analysis of one aspect of theory of case and role of government agencies in relation to that aspect, including characterization of conditions in petroleum industry, and suggestions for further information to be gathered.

The index also records that both exemptions (b)(5) and (7)(A) are claimed by de[1092]fendants for this document. This example is typical of the entries in defendants' index.

Plaintiff has not alleged, nor has defendants' showing exhibited to the Court, anything other than good faith compliance with FOIA by defendants.

Defendants have filed a motion for summary judgment. In the course of its consideration the Court ordered defendants to produce three disputed documents *in camera.* The so-called Blue Minutes of May 24 and July 29, 1977 (documents #61 and #62) and the Final Economic Report (document #12).

The Court has examined these documents *in camera* and, as more fully described below, finds that the Blue Minutes contain, among other things, some facts which are already public and some account of pre-decisional, deliberative communications within the Commission. The Final Economic Report contains pretrial tactical and strategic advice about a pending case to defendants' counsel from consulted specialists.

II. *Conclusions of Law*

This case is now before the Court on defendants' motion for summary judgment. In opposition, plaintiff raises in the first instance its need for additional discovery pursuant to Fed.R.Civ.P. 56(f). The Court has ordered that discovery be stayed pending decision on the motion for summary judgment. (Order of August 11, 1978.) The discovery issue will be considered before turning to the merits of defendants' motion for summary judgment.

A. *Plaintiff's motion for discovery pursuant to Fed.R.Civ.P. 56(f).*

Plaintiff's initial response to defendants' motion for summary judgment takes the form of an affidavit of counsel, John S. Kingdon, pursuant to Fed.R.Civ.P. 56(f), explaining that plaintiff is unable to respond to factual statements in defendants' affidavits or to formulate its full opposition to defendants' motion without first obtaining certain discovery. Plaintiff states that its discovery "seeks information concerning the retention of the economists engaged in the *Exxon* study, the involvement of Commission employees in the preparation or supervision of the Economists' Report, and the use and distribution of documents reflecting the subject matter of the

Report." Plaintiff's Opposition to Defendants' Motion for Close of Discovery, p. 2. Plaintiff also seeks discovery to respond to defendants' affidavit in support of the completeness and thoroughness of defendants' search for responsive documents. Accordingly, plaintiff outlines the following plan of discovery that it feels it must undertake in order adequately to respond to defendants' motion for summary judgment: the deposition on written questions of FTC Commissioners Pertschuk, Dole and Clanton, the oral deposition of complaint counsel in the *Exxon* case, Roger Pool, the oral deposition of Kenneth Elzinga, Professor of Economics at the University of Virginia and believed by plaintiff to have been involved in the preparation of the Final Economic Report,[7] and the oral deposition of Keith Golden, a paralegal in the FTC's Office of the Secretary, alleged by plaintiff to have been given responsibility for coordinating the FTC's search for documents responsive to plaintiff's October 25, 1977, FOIA request Kingdon affidavit, ¶¶ 4-8.

The discovery requested by plaintiff is intended to uncover facts in support of three different legal contentions: (1) that defendants are not entitled to claim any privilege, and specifically no attorney work product privilege, for the records withheld [1093](oral deposition of complaint counsel Pool, oral deposition of Professor Elzinga; Kingdon affidavit at ¶¶ 6-7), (2) that defendants have waived any exemption for the records withheld (deposition on written questions of Commissioners Pertschuk, Dole and Clanton, oral deposition of Professor Elzinga; Kingdon affidavit at ¶¶ 5 and 7), and (3) that defendants have failed to search adequately for documents responsive to plaintiff's October 25, 1977, FOIA request (oral deposition of Keith Golden; Kingdon affidavit at ¶ 8).

We shall examine plaintiff's need for discovery in light of each of the legal contentions for which plaintiff would like to find further evidence.

1. *Adequacy of Defendants' search.*

[1] Plaintiff seeks to discover facts relating to the adequacy of defendants' search for responsive records but does not put at issue defendants' claim, supported by the Thomas affidavit, that defendants' search was complete and thorough. Rather, plaintiff seeks to

[7] Defendants neither confirm nor deny that Professor Elzinga was involved in the preparation of the Final Economic Report. Defendants claim that the names of the participating economists are privileged from disclosure pursuant to exemption (b)(7)(A) of FOIA. Defendants' claim of exemption rests on the assertion that disclosure of the names of the retained economists would reveal significant aspects of the FTC's underlying economic theory of the *Exxon* case, since each economist is well known to advocate a particular type of economic theory or application of economic theory. Such disclosure, defendants argue, would be particularly important where, as in the *Exxon* case, the FTC's theory of liability is based primarily on structural economic evidence rather than on behavior.

argue that, *ab initio*, it deserves an opportunity to discover facts that may controvert the evidence submitted by defendants.

The law does not support plaintiff's position. Our Court of Appeals has very recently reiterated its position on this matter. *Goland v. CIA*, No. 76-0166, slip op. (D.C. Cir. May 23, 1978). In *Goland*, plaintiffs also claimed the right to pursue discovery before the District Court decided defendant's motion for summary judgment on the basis of defendant's affidavits. The District Court denied plaintiffs the discovery they sought and awarded defendant summary judgment. The Court of Appeals affirmed the decision of the District Court:

> In determining whether an agency has met [its] burden of proof [on summary judgment], the trial judge may rely on affidavits . . .. The agency's affidavits, naturally, must be "relatively detailed" and nonconclusory and must be submitted in good faith. But if these requirements are met, the district judge has discretion to forgo discovery and award summary judgment on the basis of affidavits. *Id.*, at 24. (footnotes omitted).

Although the defendant in *Goland* was a security agency against which discovery might appear to be particularly inappropriate, the District Court's discretion to foreclose discovery and consider a motion for summary judgment solely on the basis of agency affidavits is not limited to cases where the defendant is a security agency. *See, e.g., Nolen v. Rumsfeld*, 535 F.2d 890 (5th Cir. 1976); *Exxon Corp. v. FTC*, 384 F.Supp. 755 (D.D.C.1974), *remanded*, 174 U.S.App.D.C. 77, 527 F.2d 1386 (1976), *dismissed*, No. 73-1928 (D.D.C. 28 Feb. 1977) (limiting discovery where affidavits demonstrated adequacy of search); *Association of Nat'l Advertisers, Inc. v. FTC*, 1976-1 Trade Cases, ¶ 60,835 (D.D.C.1976) (where record indicates that agency search was "reasonably thorough," discovery may be limited by court). In *Association of Nat'l Advertisers*, plaintiff had raised detailed questions about the adequacy of the FTC's search and wished to proceed to discovery. Then Chief Judge Jones denied discovery,[8] observing that:

> Discovery of facts relevant to each of these questions inevitably would lead "down to the level of each individual participating in the search." [*Exxon Corp. v. FTC*, 384 F.Supp. 755, 760 (D.D.C.1974)]. To permit such discovery in a case such as the instant one, where the request for access is Commission-wide, and where the Secretary of the Commission has already stated under oath that the search was Commission-wide and complete, would be to permit unnecessary harassment of agency officials. 1976-1 Trade Cases at 68,644.

[8] Judge Jones did allow limited discovery through interrogatories as to a question raised by plaintiffs to which defendants offered no explanation. 1976-1 TRADE CASES at 68,644.

[2] In the present case defendants have submitted an affidavit of the Secretary of [1094] the FTC, Carol M. Thomas, to support their assertion that their search for responsive documents was complete and thorough. The Thomas affidavit explains that upon receipt of plaintiff's request [he] directed the Information and Privacy Acts Branch of the Information Division of [his] office to commence a diligent and complete search for the documents in question. All the offices that could have been in possession of responsive documents were sent copies of the request with instructions to search for responsive documents. All records in the possession of each Commissioner were completely searched, as were all records in the possession of the Bureau of Competition, the Office of General Counsel, and the Office of Secretary.

The Court is of the opinion that the Thomas affidavit is sufficient on its face to demonstrate the adequacy of defendants' search. The affidavit explains in reasonable detail the scope and method of the search and plaintiff has alleged no failure or inconsistency of proof in the matter.

A court should not, of course, cut off discovery before a proper record has been developed; for example, where the agency's response raises serious doubts as to the completeness of the agency's search, *see,* e.g., *Association of National Advertisers v. FTC, supra* at p. 68,644, where the agency's response is patently incomplete, *see,* e.g., *Virginia Independent Schools Ass'n v. Commissioner,* 1976-1 USTC, ¶ 9322 at p. 83,761 (D.D.C.1976), or where the agency's response is for some other reason unsatisfactory, *see,* e.g., *Weisberg v. U.S. Department of Justice,* 177 U.S.App.D.C. 161, 163, 543 F.2d 308, 310 (1976). But here defendants have submitted a reasonably detailed, nonconclusory affidavit explaining their search and there is no question raised as to defendants' good faith. Accordingly, the Court concludes that defendants' motion for summary judgment can and should be resolved without allowing discovery by plaintiff as to the adequacy of defendants' search. *Goland v. CIA, supra,* and cases cited therein.

2. *Entitlement of Defendants to exemption (b)(5) because of privilege for attorney work product.*

Plaintiff also seeks discovery concerning defendants' contention that a number of the withheld documents are exempt from disclosure pursuant to exemption (b)(5) because they constitute attorney work product. *N.L.R.B. v. Sears, Roebuck & Co.,* 421 U.S. 132, 95 S.Ct. 1504, 44 L.Ed.2d (1975),

[3] As discussed above, the Court has discretion in a FOIA case to forego discovery and decide the case on the basis of reasonably detail-

ed explanatory affidavits submitted by the agency in good faith. *See also Mead Data Cent., Inc. v. U.S. Dept. of Air Force,* 184 U.S.App.D.C. 350, 370, 566 F.2d 242, 262 (1977). This is no less true with respect to agency affidavits averring that identified documents are exempt than it is with respect to affidavits averring that all identifiable documents have been produced. *See Goland v. CIA.* No. 76-1800 (D.C. Cir. 1978). slip op. at 24.

Here there is no serious claim that the agency affidavits and index are defective or insufficient, *compare Brandon v. Eckard,* 187 U.S.App.D.C. 28, 34, 569 F.2d 683, 689 (1977) (A conclusory affidavit does not entitle a court to ignore claims that an allegedly exempting statute does not apply because of the nature of the materials or the failure to follow proper procedures), or that there exists conflicting affidavits with respect to material issues of fact, *compare Sears, Roebuck & Co. v. GSA,* 180 U.S.App.D.C. 202, 206, 553 F.2d 1378, 1382 (1977).

Defendants have disclosed 53% of the responsive documents located that are not on public record and have provided a relatively detailed index and accompanying affidavits, identifying and explaining the exemptions claimed for each document or portion thereof. There is no question of defendants' good faith. In light of defendants' showing and the absence of any controverting allegations by plaintiff, this Court declines to withhold its consideration of defendants' [1095] motion for summary judgment pending discovery by plaintiff.[9]

3. *Waiver of defendants' entitlement to exemption (b)(5).*

[4] Plaintiff also seeks discovery regarding the possible "waiver" by defendants of their claim to a (b)(5) exemption. Plaintiff argues, and this Court agrees, that the attorney work product privilege can be waived as a result of the actions of the party seeking to assert it. *U.S. v. Nobles,* 422 U.S. 225, 239, 95 S.Ct. 2160, 45 L.Ed.2d 141 (1975). In an appropriate case, therefore, the waiver of a work product privilege might amount to a waiver of exemption (b)(5). Plaintiff here, however, has advanced no reasons for the conclusion that defendants have, by their actions, made the application of the work product privilege inappropriate. *Compare U.S. v. Nobles, id.* (attorney electing to present investigator as witness waived work product privilege with respect to matters covered in his testimony).

Plaintiff's real argument here does not rest on a notion of "waiver" at all. Plaintiff seeks to discover whether any impermissible *ex parte* communications regarding the economists' study took place between

[9] This is not to say that defendants' submissions are sufficiently detailed and revealing to justify an award of summary judgment in defendants' favor. *See* p. 14 f., *infra.* The Court's ruling on plaintiff's 56(f) motion is without prejudice to plaintiff's seeking discovery at a later time if defendants' supplemental submissions are inadequately responsive to the Court's direction here.

a Commissioner (or his staff member) and any other party that would oblige the FTC to make the subject of such communications part of the public record pursuant to the FTC's own regulations. 16 C.F.R. § 4.7 (1978).[10] Documents thus required by law to be disclosed to the opposing party in litigation with the FTC, plaintiff argues, no longer fall within the scope of exemption (b)(5), since that exemption protects only records "which would not be available by law to a party other than an agency in litigation with the agency".

Plaintiff's argument is misconceived, however, in that it supposes the availability of exemption (b)(5) to turn on the particular circumstances relevant to discovery between plaintiff and defendant in the *Exxon* case. In *Sterling Drug Inc. v. F.T.C.*, 146 U.S.App.D.C. 237, 450 F.2d 698 (1971), the [1096] FOIA plaintiff advanced the same type of argument, seeking to defeat the FTC's claim to a (b)(5) exemption on the ground that it had the right to discover the documents in question in a collateral lawsuit being pursued contemporaneously with the Commission. The Court of Appeals rejected this interpretation of exemption (b)(5). Instead, the Court of Appeals observed:

> The correct test for determining which documents are not exempt under § 552(b)(5) is [that] . . . any internal memorandums which would routinely be disclosed to a private party through the discovery process in litigation with the agency would be available to the general public. 146 U.S.App.D.C. at 244, 450 F.2d at 705.

The Court of Appeals emphasized that the question was whether a private party, not a particular litigating plaintiff, would routinely be entitled to the documents through discovery. Id., 146 U.S.App.D.C. at 244, 450 F.2d at 705. Exemption (b)(5) calls for the application of general principles of civil discovery, *see EPA v. Mink*, 410 U.S. 73, 86, 93 S.Ct. 827, 35 L.Ed.2d 119 (1973); *NLRB v. Sears, Roebuck &*

[10] This regulation provides in relevant part:

(b) *Prohibited ex parte communications.* While a proceeding is in adjudicative status within the Commission, except to the extent required for the disposition of *ex parte* matters as authorized by law, (1) no person not employed by the Commission, and no employee or agent of the Commission who performs investigative or prosecuting functions in adjudicative proceedings, shall make or knowingly cause to be made to any member of the Commission, or to the Administrative Law Judge, or to any other employee who is or who reasonably may be expected to be involved in the decisional process in the proceeding, an ex parte communication relevant to the merits of that or a factually related proceeding, and (2) no member of the Commission, the Administrative Law Judge, or any other employee who reasonably may be expected to be involved in the decisional process in the proceeding, shall make or knowingly cause to be made to any person not employed by the Commission, or to any employee or agent of the Commission who performs investigative or prosecting [sic] functions in adjudicative proceedings, an ex parte communication relevant to the merits of that or a factually related proceeding.

(c) *Procedures.* A Commissioner, the Administrative Law Judge or any other employee who is or who may reasonably be expected to be involved in the decisional process who receives or who makes or knowingly causes to be made, a communication prohibited by paragraph (b) of this section shall promptly provide to the Secretary of the Commission: (1) All such written communications; (2) memoranda stating the substance of and circumstances of all such oral communications; and (3) all written responses, and memoranda stating the substance of all oral responses to the materials described in paragraph (c)(1) and (2) of this section. The Secretary shall make relevant portions of any such materials part of the public record of the Commission, pursuant to § 4.8, and place them in the docket binder of the proceeding to which it pertains but they will not be considered by the Commission as part of the record for purposes of decision unless introduced into evidence in the proceeding. The Secretary shall also send copies of the materials to or otherwise notify all parties to the proceeding.

Co., 421 U.S. 132, 149, 95 S.Ct. 1504, 44 L.Ed.2d 29 (1975); *see also Mead Data Cent., Inc. v. U.S. Dept. of Air Force*, 184 U.S.App.D.C. 350, 360, 566 F.2d 242, 252 (1977), to determine if the documents at issue would normally be privileged.

[5-7] Accordingly, the particular claims of a particular litigant related to a particular lawsuit cannot affect the application of exemption (b)(5) in an independent FOIA action. The Court concludes that plaintiff's requested discovery with respect to the "waiver" issue is unnecessary because it would be irrelevant. If plaintiff believes that the special circumstances of its case in conjunction with FTC regulations on *ex parte* communications entitle it to have some or all of the affected documents placed on the public record, the proper way to pursue that claim is to follow the administrative appeal procedures laid down by Congress and the FTC. Congress did not intend FOIA to be used as an avenue for the kind of collateral attack attempted by plaintiff here.

The Court concludes that plaintiff is not as a matter of right, entitled to discovery regarding defendants' search for responsive documents or their claim of exemption (including the alleged "waiver" thereof) for documents located. Upon the showing of defendants in this case the Court furthermore declines, as a matter of discretion to allow such discovery. Accordingly, the Court denies plaintiff motion under Fed.R.Civ.P. 56(f) to make discovery and turns to the merits of defendants' motion for summary judgment.

B. *Defendants' motion for summary judgment.*

The Court finds defendants' factual showing, as reflected in its affidavits and its *in camera* submission, requires partial summary judgment in defendants' favor, and requires further submissions before decisions on other issues raised by defendants' motion.

1. *Documents not examined in camera.*

[8] Defendants have failed in their affidavits to provide the Court with sufficiently specific explanations, for each manageable portion of each document withheld, of the grounds supporting each exemption, and each theory advanced in support of each exemption, claimed. For example, defendants seek to invoke both "deliberative process" and "work product" theories in support of their claim to exemption (b)(5) for some documents, but the supporting affidavit, the Pool affidavit, fails to offer any systematic, detailed explanation of which documents are supposed to fall under one theory, which are to fall under the other, and which are to fall under both. The Pool affidavit also lacks the specific, detailed explanations of legally rele-

vant facts necessary to enable a FOIA defendant to prevail on summary judgment. *See generally Mead Data Cent., Inc. v. U.S. Dept. of Air Force,* 184 U.S.App.D.C. 350, 566 F.2d 242 (1977). Specific statements about a single document or patently indistinguishable [1097] groups of documents are preferred to sweeping statements about categories of documents. In addition, little effort has gone into showing that every manageable portion of every document withheld qualifies for exemption under any or all of the theories advanced by defendants. *See Ray v. Turner,* 190 U.S.App.D.C. 290, 587 F.2d 1187 (1978) and *Marks v. CIA,* 191 U.S.App.D.C. 295, 590 F.2d 997 (1978).

Finally, defendants' affidavit, the Thomas affidavit, in support of the claim that there are no "final opinions" within the meaning of 5 U.S.C. § 552(a)(2)(A) among the documents withheld is obviously conclusory and therefore inadequate. *Compare Bristol-Myers v. FTC,* No. 76-1364 (D.C.Cir. August 22, 1978). Accordingly, the Court declines to grant or deny the balance of defendants' motion for summary judgment until they have had an opportunity to submit additional affidavits pursuant to the order attached hereto.

To be most helpful to the Court, the additional affidavits might take the form of a much-expanded index, proceeding, for each document, to explain what the smallest manageable portions are, describing why each such portion is entitled to each exemption claimed, and under what theories. A separate affidavit, also in index form, could explain the extent to which any document for which an exemption is claimed: (i) falls within the affirmative disclosure provisions of 5 U.S.C. § 552(a)(2)(A)-(C), and (ii) is (or is not) incorporated by reference into any other document either currently withheld or released pursuant to 5 U.S.C. § 552(a)(2)(A)-(C).

2. *Documents examined in camera.*

Pursuant to the Court's Order of September 18, 1978, defendants have submitted for *in camera* inspection copies of two Blue Minutes (documents #61 and #62) and the Economic Report (document # 12). Examination of these documents by the Court further confirms the Court's impression, noted above, that defendants have failed to fulfill their obligation to disclose segregable portions of non-exempt material. Defendants seek to withhold all three documents in full pursuant to exemption (b)(5).[11] This exemption allows an agency to withhold "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5).

[11] Defendants also invoke exemption (b)(7)(A) as a basis for withholding the Final Economic Report. Defendants' index at p. 4. In light of the Court's disposition of defendants' (b)(5) claim, however, the Court finds it unnecessary to rule on the (b)(7)(A) issue.

[9] Exemption (b)(5) was intended, *inter alia,* to protect "the decison making processes of government agencies." *NLRB v. Sears, Roebuck & Co.,* 421 U.S. 132, 150, 95 S.Ct. 1504, 44 L.Ed.2d 29 (1975). This deliberative process privilege has its core in "documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." *Id.* at 150, 95 S.Ct. at 1516. As a matter of logical extension of this principle courts have established the general rule that pre-decisional, deliberative memoranda are privileged, while post-decisional memoranda-communications designed to explain a decision already made—are not, *Bristol-Myers Company v. FTC,* No. 76-1364, slip op. at 7 (August 22, 1978); *Jordan v. U.S. Department of Justice,* 192 U.S.App.D.C. 144 at 165, 591 F.2d 753 at 774 (1978); nor are segregable portions of factual material which would not expose the deliberative process. *Mead Data Cent., Inc. v. U.S. Dept. of Air Force,* 184 U.S.App.D.C. 350, 370, 566 F.2d 242, 256 (1977); *compare Mervin v. FTC,* 192 U.S.App.D.C. 212 at 216, 591 F.2d 821 at 825 (1978).

Applying these standards to the two Blue Minutes in the present case the Court finds that defendants are entitled to withhold one portion of document #62 (Blue Minutes of July 29, 1977) pursuant to the deliberative process privilege incorporated into extemption (b)(5), but must disclose document #61 (Blue Minutes of May 24, 1977) in its entirety.

[10-12] Document #61 reflects the decision of the Commission on the request of complaint counsel, certified by the administrative law judge, in the *Exxon* case for judicial enforcement of subpoenas issued to some of the defendants in that case. Document #61 consists of seven paragraphs, none of which is entitled to exemption from mandatory disclosure under FOIA. Paragraphs 1, 6 and 7 consist entirely of factual material whose disclosure would not in any apparent way intrude on the deliberative process of the Commission. Paragraphs 2 and 4 reflect the final decision of the Commission on the enforcement matter and therefore fail to satisfy the pre-decisional requirement of the deliberative process privilege. *See Jordan, id.* Paragraphs 3 and 5 indicate how the individual Commissioners voted and, in the case of one Commissioner, the reason for his vote. Paragraph 5 indicates that the votes cast by the Commissioners were to be made part of the public record, presumably by recording the votes in the order that was the result of the Commissioners' action. The order itself represents a final opinion by the Commission and would not be entitled to an exemption under the deliberative process privilege. Because the record of votes cast has evidently been incorporated into this final order the Court finds that this record cannot qualify for a (b)(5) exemption under the deliberative process privilege. The in-

corporation of what might otherwise be privileged material into a final opinion causes such material to lose its privileged character. *Compare Sears, supra,* 421 U.S. at 161, 95 S.Ct. 1504; *Bristol-Myers Company, supra,* slip op. at 10 and 17. The Court also finds that the reason recorded in the Blue Minutes for the vote of one of the Commissioners is not entitled to the protection of the deliberative process privilege. If a Commissioner chooses to explain his part in a final decision of the Commission contemporaneously with the taking of such a decision this explanation is not predecisional and therefore is not covered by the privilege protecting the deliberative process. *See Jordan, supra,* 192 U.S.App.D.C. at 164-165, 591 F.2d at 773-774.

Document #62 concerns the Commission's action taken in response to a July 25, 1977 decision of the Court of Appeals for the District of Columbia Circuit requiring the Commission to sequester certain data obtained by complaint counsel in the course of the adjudication of the *Exxon* case. Document #62 consists of six paragraphs. The first sentence of the first paragraph identifies a D.C. Circuit opinion being referred to the Commission by the General Counsel. This sentence simply describes the subject of the Commissioners' meeting and fails to reveal the deliberative process of the Commission.[12] In the second sentence, however, the General Counsel draws the Commission's attention to a fact that might bear on the Commission's action. The Court finds the second sentence of paragraph 1 exempt under (b)(5) in that its disclosure would reveal the Commission's consultation with the General Counsel, thereby impinging upon the process by which Commission policies are formulated. *See Mervin, supra,* 192 U.S.App.D.C. at 216, 591 F.2d at 825. The second sentence is furthermore not a final opinion itself nor does it appear to have been incorporated into any such opinion. Paragraph 2 recites the final disposition of the sequestration matter by the Commission and is therefore excluded from the deliberative process privilege because it is not predecisional material.[13] Paragraphs 3, 5 and 6 record the procedural mechanics attending the Com[1099]mission's decision and therefore do not fall within the deliberative process privilege because they are neither predecisional nor deliberative. Paragraph 4 records the votes of the five Commissioners for the public record. The Court finds that this paragraph falls outside of the deliberative process privilege because the record of the Commissioners' votes has been incorporated into the Commission's final order directing sequestration.

[12] The Court notes, in this respect, that the Commission's decision on the matter of sequestration here is already part of the public record in the relevant proceedings. Blue Minutes #62, ¶¶ 3-5. The situation might well be different if the subject of the meeting were not otherwise disclosed.

[13] The decision described in paragraph 2 is also apparently fully incorporated into the Commission's final letter of notification. Blue Minutes #62, ¶ 2.

In sum, the Court finds defendants have properly withheld only one sentence from documents #61 and #62: the second sentence of paragraph 1 in document #62. All other portions of these two documents have been improperly withheld by defendants and shall be disclosed to plaintiff pursuant to the Court's order accompanying this memorandum.

[13] With respect to the Final Economic Report, the Court finds the entire document to fall within the privilege of attorney work-product and therefore entitled to exemption under (b)(5). *See NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 95 S.Ct. 1504, 44 L.Ed.2d 29 (1965). The Final Economic Report was prepared by expert consultants, at the direction of and for the guidance of FTC lawyers, and discusses a large range of tactical and strategic issues and options relating to the presentation of the *Exxon* case. It is the essence of the "think-piece" protected as "factual information, mental impressions, conclusions, opinions, legal theories or legal strategies relevant to [a] . . . prospective trial." *Jordan v. U.S., supra*, 192 U.S.App.D.C. at 167, 591 F.2d at 776. *See Mervin v. FTC*, 192 U.S.App.D.C. 212, 591 F.2d 821 (1978). It is clear that the Final Economic Report was prepared after the complaint was issued in the *Exxon* case. It was prepared at the direction of the FTC's attorneys in aid of the FTC's prosecution of the *Exxon* case. The Final Economic Report is therefore privileged attorney work-product, Fed.R.Civ.P. 26(b)(3), and exempt from mandatory disclosure under (b)(5) of FOIA. *See Bristol-Myers Company, supra* at 19.

UNITED STATES v. READER'S DIGEST ASSOCIATION, INC.*

Civ. A. No. 75-184. F.T.C. Docket No. C-2075.

(United States District Court, District of Delaware, November 28, 1978 As Amended March 20, 1979)

1. WHETHER RESPONDENT VIOLATED FTC ORDER, AND IF SO, AMOUNT OF PENALTY THAT SHOULD BE IMPOSED ARE MAJOR ISSUES IN CIVIL PENALTY ACTION.

   [1038] Principal issues in action seeking civil penalty for alleged violation of Federal Trade Commission order are whether the defendant violated the order and, if so, what amount of money should be assessed as a penalty.

2. PROVIDED IT DOES NOT EXCEED STATUTORY MAXIMUM, AMOUNT OF CIVIL PENALTY IS LEFT TO INFORMED DISCRETION OF DISTRICT COURT.

   Amount of penalty for violation of Federal Trade Commission order is left to the informed discretion of the district court judge, provided penalty does not exceed the statutory maximum.

3. DUE PROCESS DOES NOT BAR FTC FROM INSTITUTING CIVIL PENALTY PROCEEDING FOR ALLEGED VIOLATION OF CONSENT ORDER WITHOUT PROVIDING RESPONDENT WITH PRIOR NOTICE AND HEARING.

   Due process did not require Federal Trade Commission to afford magazine publisher notice and hearing prior to instituting civil penalty action for violation of consent cease and desist order.

4. IN A CIVIL PENALTY ACTION ALLEGING VIOLATION OF FTC ORDER, EQUITABLE DEFENSES OF LACHES, WAIVER AND ESTOPPEL DO NOT APPLY.

   Equitable defenses of laches, waiver and estoppel had no application in action by Federal Trade Commission to recover civil penalty for alleged violation of consent cease and desist order.

5. IN CIVIL PENALTY ACTION ALLEGING VIOLATION OF FTC CEASE AND DESIST ORDER, RESPONDENT'S GOOD FAITH OR LACK OF INTENT HAD NO BEARING ON QUESTION OF LIABILITY.

   Magazine publisher's good faith or lack of intent had no bearing on question of liability in Federal Trade Commission's action seeking civil penalty for alleged violations of consent cease and desist order.

6. IN DETERMINING IMPOSITION OF PENALTY, GOOD FAITH OF RESPONDENT AND ALLEGED LACK OF NOTICE OF GOVERNMENT'S INTENTION TO INSTITUTE CIVIL PENALTY SUIT SHOULD BE CONSIDERED BY COURT.

   Good faith of a defendant and alleged lack of notice prior to instituting civil penalty action were to be considered in determining penalty, if any, to be imposed for alleged violations of Federal Trade Commission consent order.

7. SINCE CASE WAS NOT UNDULY COMPLICATED AND GOVERNMENT HAD NOT SHOWN IT WAS PREJUDICED BY THEIR PRESENCE, AFFIRMATIVE DEFENSES THAT RAISED MATTERS FOR COURT'S

*Reported in 464 F.Supp. 1037 (1978). For case before the Commission, see 79 F.T.C. 696; *modified* 83 F.T.C. 1365.

CONSIDERATION IN DETERMINING PENALTY WOULD NOT BE STRICKEN, EVEN THOUGH THEY WERE INSUFFICIENT TO AVOID LIABILITY.

Although matters raised in affirmative defenses, i.e., that defendant was entitled to notice and hearing prior to instituting civil penalty action and that Government's claim was barred by laches, waiver and estoppel, furnished no defense to action seeking civil penalty for alleged violations of Federal Trade Commission consent order and they would not be stricken since matters could be considered in determining penalty and case was not unduly complicated and Government failed to show that it was prejudiced by presence of such defenses.

8. COURT'S ROLE IN A CIVIL PENALTIES ACTION IS TO DETERMINE WHETHER CHALLENGED PRACTICE FALLS WITHIN ORDER'S PROSCRIPTION, NOT WHETHER PRACTICE IS DECEPTIVE.

[1039] In an action to recover civil penalties for violation of a Federal Trade Commission order the court's role is not to determine whether the challenged practice is deceptive, but merely to consider whether the practice falls within the order's proscription.

9. AN FTC CEASE AND DESIST ORDER MUST BE INTERPRETED IN LIGHT OF ITS PRIMARY PURPOSE.

A Federal Trade Commission cease and desist order must be interpreted in light of its principal purpose.

10 ADJECTIVE "CONFUSINGLY," AS USED IN PROVISION OF ORDER PROSCRIBING DISTRIBUTION OF SIMULATED CHECKS OR ANY "CONFUSINGLY SIMULATED ITEM OF VALUE," WAS CONSTRUED TO MODIFY ITEMS SPECIFICALLY MENTIONED, IN LIGHT OF ADMINISTRATIVE COMPLAINT CHARGING THAT SPECIFIED ITEMS WERE OF NO VALUE AND MISLEADING.

When viewed in light of administrative complaint, which charged that simulated checks and other negotiable instruments and simulated new car certificates were of no value and that such practices had capacity to mislead the adjective "confusingly", as used in provision of cease and desist consent order proscribing distribution of simulated checks or any confusingly simulated item of value, was interpreted to modify the specific items mentioned and such items were simply examples of material generically described as confusingly simulated items of value.

11. SINCE ADMINISTRATIVE COMPLAINT HELD THAT CERTAIN PRACTICES WERE DECEPTIVE OR CONFUSING, AND PUBLISHER ENTERED INTO A CONSENT ORDER PROHIBITING THOSE AND SIMILAR PRACTICES, PHASE "CONFUSINGLY SIMULATED ITEMS OF VALUE," AS USED IN THAT ORDER, WOULD NOT BE CONSTRUED AS REQUIRING PROOF OF CONSUMER CONFUSION.

Since Federal Trade Commission issued administrative complaint reflecting its belief that certain practices were deceptive or confusing and entered into consent order requiring publisher to cease and desist from employing those and similar practices, phrase "confusingly simulated items of value" as used in cease and desist order would not be construed as requiring proof that offending items actually confused consumers, especially since if Government was seeking to enforce prohibition of unfair or deceptive advertising in an original administrative proceeding it would only have to show a tendency or capacity to deceive.

12. TO PREVENT SIMILAR VIOLATIONS IN THE FUTURE, FTC IS EMPOWERED TO FRAME CEASE AND DESIST ORDERS BROADLY.

Federal Trade Commission has authority to frame a cease and desist order broadly to prevent a violator from engaging in similar illegal practices in future advertisements.

13. A RESPONDENT WHO ENTERS INTO A CONSENT ORDER RATHER THAN CONTEST FTC'S ADMINISTRATIVE COMPLAINT MUST EXPECT SOME FENCING IN.

Having decided to enter into a consent cease and desist order rather than contest Federal Trade Commission's administrative complaint, magazine publisher, challenging scope of consent order, was required to expect some fencing in.

14. FINDING THAT TRAVEL CHECK OR CASH-CONVERTIBLE BOND VIOLATED THE ORDER DID NOT REQUIRE PROOF OF CONSUMER CONFUSION, SINCE THEY WERE SIMILAR TO SPECIFIC ITEMS CHALLENGED IN THE ADMINISTRATIVE COMPLAINT, AND PHRASE "CONFUSINGLY SIMULATED ITEM OF VALUE" IN THE ORDER WAS CONSTRUED TO MODIFY THOSE ITEMS.

Where prohibited goal in deceptive practices proceeding brought against publisher was inducement of participation in sweepstakes by means of items that appeared to be of value but in fact were not, phrase "confusingly simulated item of value" as used in cease and desist order was interpreted as applying to advertising material that was similar to the items mentioned in the complaint and, on its face, could be said to have the same capacity or tendency to mislead consumers and, hence, consent order would not be construed to require proof of actual confusion to support finding that travel check or cash-convertible bond violated the order.

15. PUBLISHER WOULD NOT BE HELD TO HAVE WAIVED RIGHT TO CHALLENGE CONSENT ORDER ON FIRST AMENDMENT GROUNDS, SINCE ADVERTISING HAD NOT BEEN AFFORDED FIRST AMENDMENT PROTECTION UNTIL FIVE YEARS AFTER CONSENT ORDER WAS ISSUED.

Where advertising did not enjoy First Amendment protection until five years after issuance of Federal Trade Commission's consent cease and desist order, magazine publisher would not be held to have waived its right to challenge the order on First Amendment grounds in civil penalty action. [1040]

16. ASSERTION OF A NEWLY RECOGNIZED CONSTITUTIONAL ARGUMENT MUST BE TIMELY.

A newly recognized constitutional argument must be asserted seasonably.

17. SINCE RESPONDENT HAD FAILED TO TIMELY ADDRESS THE NEED FOR ADMINISTRATIVE EXHAUSTION OF FIRST AMENDMENT ISSUE, THE MATTER WOULD NOT BE CONSIDERED BY COURT.

Where parties to action seeking civil penalty for alleged violations of Federal Trade Commission consent order had not addressed need for administrative exhaustion of First Amendment issue following Supreme Court's decision according limited constitutional protection to commercial speech the court would not consider such matter.

18. APPROPRIATE TIME, PLACE AND MANNER RESTRICTIONS MAY BE IMPOSED ON COMMERCIAL SPEECH AND FALSE OR MISLEADING ADVERTISING PROHIBITED, SINCE SUPREME COURT DECISION BESTOWING LIMITED FIRST AMENDMENT PROTECTION ON COMMERCIAL SPEECH DID NOT COMPLETELY BAR ITS REGULATION.

Supreme Court's decision in *Virginia State Board of Pharmacy,* which decision recognized limited First Amendment protection of commercial speech, did not completely bar regulations of commercial speech; appropriate time, place and manner restrictions may be imposed on such speech and false or misleading advertisements may be forbidden.

19. FOR FIRST AMENDMENT PURPOSES, PROSCRIPTION AGAINST USE OF "SIMULATED CHECKS" AND ANY "CONFUSINGLY SIMULATED ITEM OF VALUE" REPRESENTED A RESTRICTION ON MANNER, NOT CONTENT OF COMMERCIAL SPEECH, SINCE IT DID NOT BAR PUBLISHER FROM COMMUNICATING THE TERMS OF ITS "SWEEPSTAKES" IN ANOTHER FORM.

Provision of consent cease and desist order proscribing magazine publisher's use of "simulated checks" or "any confusing simulated item of value" in promotional sweepstakes did not restrain publisher from communicating the terms of sweepstakes promotions to the public but merely prohibited communication of such information in a form the Government considered misleading or deceptive; for First Amendment purposes, order represented restriction on manner of speech rather than content.

20. GOVERNMENT'S INTEREST IN PREVENTING USE OF DECEPTIVE ADVERTISING IS A LEGITIMATE AND IMPORTANT ONE, FOR FIRST AMENDMENT PURPOSES.

For First Amendment protection of commercial speech the Government's interest in preventing use of deceptive advertising is a legitimate and important one.

21. WHILE GOVERNMENT HAS AUTHORITY TO FRAME CEASE AND DESIST ORDERS BROADLY TO PREVENT SIMILAR VIOLATIONS IN THE FUTURE, IT CANNOT IGNORE FIRST AMENDMENT INTEREST BECAUSE A VIOLATION HAS BEEN ESTABLISHED.

Federal Trade Commission can frame a cease and desist order broadly enough to prevent one who has engaged in allegedly deceptive practices from engaging in similar practices in future activities, however, fact that a violation has been established does not permit the Government to ignore First Amendment interest.

22. SINCE PUBLISHER'S TRAVEL CHECK AND CASH-CONVERTIBLE BOND DID NOT CONSTITUTE VALUABLE BUSINESS ASSETS, SUCH AS A TRADE NAME, THEY DID NOT WARRANT THE SAME HIGH LEVEL OF FIRST AMENDMENT PROTECTION.

Travel check and bond used by magazine publisher in promotional sweepstakes did not constitute valuable business assets, such as a trade name, and, hence, did not require the same high level of protection before their use could be proscribed as deceptive trade practices.

23. PROHIBITION AGAINST PRIOR RESTRAINTS MAY BE INAPPLICABLE WHEN PURELY COMMERCIAL SPEECH IS INVOLVED.

When purely commercial speech is involved the prohibition against prior restraints may be inapplicable.

24. SINCE FTC IS EMPOWERED TO FASHION APPROPRIATE RESTRAINTS ON FUTURE ACTIVITIES TO PREVENT RECURRENCE OF A VIOLATION AND COULD ABRIDGE FIRST AMENDMENT FREEDOMS TO ACHIEVE SUCH OBJECTIVE, ORDER IS NOT RENDERED UNCONSTITUTIONAL BECAUSE IT MIGHT CURTAIL SOME PROTECTED COMMERCIAL SPEECH.

Possibility that consent cease and desist order, which proscribed use of "simulated checks" or "any confusingly simulated item of value" in connection with magazine publisher's promotional sweepstakes, might curtail some protected commercial speech if not limited to provably deceptive advertising did not necessarily mean that order was unconstitutional; on its belief that publisher had violated Federal Trade Commission Act the FTC was empowered to fashion appropriate restraints on future activities [1041] to avoid a recurrence of the violation and to extent that it was necessary to achieve such objective effectively, the agency could abridge First Amendment freedoms.

25. PROVISION BARRING USE OF "SIMULATED CHECKS" AND "ANY CONFUSINGLY SIMULATED ITEM OF VALUE" PASSED FIRST AMENDMENT MUSTER WITHOUT REQUIREMENT OF PROOF OF DECEPTION, SINCE PUBLISHER, BY ENTERING INTO CONSENT ORDER, WAIVED RIGHT TO CHALLENGE ITEMS HELD DECEPTIVE IN ADMINISTRATIVE COMPLAINT; NOR WAS IT UNREASONABLE TO ASSUME THAT ALL SIMULATED ITEMS OF VALUE WOULD BE DECEPTIVE, GIVEN PREMISE THAT SIMULATED CHECK INCLUDED IN COMPLAINT WAS DECEPTIVE.

By entering into consent cease and desist order, magazine publisher relinquished right to contend that items mentioned in administrative complaint were not deceptive and, hence, provision of consent order proscribing distribution of "simulated checks" or "any confusingly simulated item of value" passed First Amendment muster without requirement of proof of deception; given premise that simulated check included in complaint was deceptive, presumption that all simulated items of value probably would be deceptive was not unreasonable, especially since the commercial speech affected did not concern a matter of important public interest and form rather than content was regulated in a nonchilling manner.

26. FTC CEASE AND DESIST ORDERS MUST BE AS SPECIFIC AS CIRCUMSTANCES ALLOW.

Federal Trade Commission cease and desist order must be as specific as the circumstances will permit.

27. DISPUTED PROVISION MET SPECIFICITY STANDARD WHEN VIEWED IN LIGHT OF ADMINISTRATIVE COMPLAINT, SINCE CONSENT ORDER'S PRINCIPAL PURPOSE WAS TO PREVENT DISTRIBUTION OF ANY SIMULATED ITEM OF VALUE, AND PUBLISHER COULD EVADE THAT PURPOSE IF ORDER WAS DRAWN MORE NARROWLY.

Consent cease and desist order proscribing magazine publisher's use or distribution of "simulated checks" or "any confusingly simulated item of value" in promotional sweepstakes met specificity requirements when viewed in light of administrative complaint; order could not have been drawn more narrowly without permitting publisher to evade its principal purpose of prohibiting inducement of participation in sweepstakes by means of items that appeared to be of value but were not.

28. IN THE ORDINARY COMMERCIAL CONTEXT, DOCTRINE OF OVERBREADTH APPLIES WEAKLY, IF AT ALL.

Doctrine of overbreadth applies weakly, if at all, in the ordinary commercial context.

29. WHEN VIEWED IN LIGHT OF ADMINISTRATIVE COMPLAINT, CHALLENGED PROVISION WAS NOT UNCONSTITUTIONALLY VAGUE.

Provision of consent cease and desist order prohibiting magazine publisher from the use or distribution of "simulated checks" or "any confusingly simulated item of value" was not unconstitutionally vague when viewed in light of administrative complaint.

30. FTC'S JUDGMENT THAT THE ORDER HAS BEEN VIOLATED IS DUE NO SPECIAL DEFERENCE, SINCE THIS IS A MATTER FOR THE COURT TO DECIDE.

It was for district court to decide whether Federal Trade Commission consent cease and desist order had in fact been violated; no special deference was due judgment of the FTC on the issue.

31. SINCE PROMOTIONAL TRAVEL CHECK FAITHFULLY IMITATED A REAL ONE, AND VARIED ONLY SLIGHTLY FROM SIMULATED CHECK WHICH TRIGGERED ADMINISTRATIVE COMPLAINT, IT FELL WITHIN MEANING OF ORDER'S PROSCRIPTION, EVEN THOUGH IT WAS PLACED IN CENTER OF 12-PAGE PAMPHLET AND ITS REVERSE SIDE CONTAINED ADVERTISING COPY.

Travel check distributed by magazine publisher as sweepstakes promotion device was a "simulated check" within meaning of consent order proscribing use or distribution of such checks where, among other things, such check was strikingly similar to simulated check which triggered administrative complaint and faithfully imitated, a real traveler's check, notwithstanding that reverse side contained advertising copy or that check was placed at center of 12-page pamphlet, especially since such check contained only slight changes in wording and minor variations in format of the simulated checks.

32. BY MAKING ONLY MINOR CHANGES IN SUBSEQUENTLY ISSUED TRAVEL CHECK, PUBLISHER RISKED CROSSING LINE OF PERMITTED CONDUCT, AND ALLEGATION THAT CHANGES WERE TO INSURE THAT ITEM COULD NOT BE MISTAKEN FOR AN ACTUAL CHECK WAS IRRELEVANT IN DETERMINING WHETHER IT CONSTITUTED A PROSCRIBED "SIMULATED CHECK."

That purpose of changes in simulated check, which was basis of administrative [1042] complaint charging magazine publisher with deceptive advertising in sweepstakes promotional devices, was to insure that subsequently issued travel check could not be mistaken for an actual check was irrelevant to determination whether the latter constituted a "simulated check" within meaning of consent cease and desist order since by making only minor changes in wording and format the publisher took the risk that it might cross the line between permitted and proscribed conduct.

33. SINCE TRAVEL CHECK WAS DISTRIBUTED AS PART OF A PAMPHLET LABELED A "SWEEPSTAKES PASSPORT," WHICH WAS DESIGNED TO RESEMBLE A UNITED STATES PASSPORT, ADVERTISING MUST BE CONSIDERED AS A WHOLE IN DETERMINING WHETHER THE CHECK HAD A TENDENCY TO DECEIVE.

Although travel check which allegedly violated consent cease and desist order, was part of a 12-page sweepstakes pamphlet, the advertising was to be inserted as a whole in assessing tendency of such check to deceive, for purpose of determining whether it constituted a proscribed "simulated check," especially since the check was distributed in a pamphlet labeled a "Sweepstakes Passport," which was designed to look like a United States Passport.

34. CONSIDERATION MUST BE GIVEN TO AUDIENCE TO WHICH ADVERTISING IS DIRECTED IN DETERMINING WHETHER IT HAS A TENDENCY OR CAPACITY TO DECEIVE.

In determining whether advertising has a tendency or capacity to deceive, consideration must be given to the audience to which it is directed.

35. IN DETERMINING WHETHER CHALLENGED TRAVEL CHECK WAS A PROHIBITED "SIMULATED ITEM OF VALUE," COURT MUST CONSIDER FACT THAT PUBLISHER, BY ENTERING INTO THE CONSENT ORDER, HAD WAIVED ITS RIGHT TO CONTEND THAT ITEMS AKIN TO THOSE INCLUDED IN ORIGINAL COMPLAINT DID NOT VIOLATE ORDER'S PROSCRIPTION.

Fact that by entering into cease and desist consent order magazine publisher waived its right to contend that items akin to simulated check included in original administrative complaint were not confusingly simulated items of

value was a factor to be considered in determining whether travel check used in subsequent sweepstakes promotional materials violated consent order's proscription on use or description of "simulated checks" or "any confusingly simulated item of value."

36. EVEN THOUGH THERE WAS NO SUCH THING, CASH-CONVERTIBLE INCLUDED IN PROMOTIONAL SWEEPSTAKES MATERIAL WAS A PROHIBITED "CONFUSINGLY SIMULATED ITEM OF VALUE," SINCE IT RESEMBLED A FINANCIAL INSTRUMENT AND HAD MANY OF THE SAME CHARACTERISTICS AS SIMULATED CHECK INCLUDED IN ORIGINAL COMPLAINT.

Cash-convertible bond included with magazine publisher's promotional sweepstakes material was a "confusingly simulated item of value" within meaning of consent cease and desist order prohibiting publisher from use or distribution of "simulated checks" or "any confusing simulated item of value" where, among other things, it has many of the same characteristics as original simulated check on which administrative complaint was based, material was distributed to general public and bonds were made to look like financial instruments, notwithstanding that there may be no such thing as a "Cash-Convertible" bond.

United States sued magazine publisher seeking injunctive relief and civil penalties under Federal Trade Commission Act for alleged violations of consent cease and desist order proscribing use or distribution of "simulated checks" or "any confusingly simulated item of value" in connection with promotional sweepstakes. The District Court, Latchum, Chief Judge, held that: (1) by entering into consent order the publisher relinquished its right to contend that items mentioned in original complaint, including a simulated check, were not deceptive; (2) quoted portion of order passed First Amendment muster without a requirement of proof of deception; (3) fact that violation of section 5 of Federal Trade Commission Act has been established does not permit the Government to ignore First Amendment interest since commercial speech is entitled to limited First Amendment protection; (4) quoted portion of order met specificity requirements and was not unconstitutionally vague, and (5) allegedly offending travel check constituted a "simulated check" and cash-convertible bond was a "confusingly simulated item of value" where, among other things, both had same characteristics as simulated check included in administrative complaint.

Partial summary judgment for Government on liability issue.

(Syllabus, with substituted captions, taken from 464 F.Supp. 1037)

James W. Garvin, Jr., U.S. Atty., Wilmington, Del., and *James A. Calderwood*, Atty., Dept. of Justice, Washington, D.C., for plaintiff.

R.Franklin Balotti and *Donald A. Bussard* of *Richards, Layton & Finger*, Wilmington, Del., and *John B. Kuhns* of *Williams & Connolly*, Washington, D.C., for defendant.

OPINION

LATCHUM, *Chief Judge.*

This is an action brought by the United States of America (the "Government") against Reader's Digest Association, Inc. ("Reader's Digest") to obtain injunctive relief and recover civil penalties pur-

suant to sections 5 (l) and 16(a)(1) of the Federal Trade Commission Act (the "Act"),[1] for al[1043]leged violations of a consent order. The order required Reader's Digest, which regularly uses a promotional device known as a "sweepstakes" in its business of selling and distributing magazines, books and other products, to cease and desist from engaging in various practices in connection with any sweepstakes or other similar promotional device. Among the practices proscribed were the use or distribution of "simulated checks" or "any confusingly simulated item of value."[2] The complaint alleges that Reader's Digest violated the order by distributing an item labeled a "TRAVEL CHECK" and another item labeled a "CASH-CONVERTIBLE BOND" in connection with two different sweepstakes.

[1, 2] The principal issues in a civil penalty action are whether the defendant violated the FTC order in question and, if so, what amount of money should be assessed as a penalty.[3] This case is presently before the Court on Reader's Digest's motion for summary judgment and the Government's motion for partial summary judgment on the issue of liability and to strike two affirmative defenses raised by Reader's Digest in its answer.[4] The challenged defenses are: (1) that the FTC violated Reader's Digest's constitutional right to substantive and procedural due process by implementing and interpreting the consent order in an arbitrary and capricious manner and (2) that the Government's claims are barred by laches, waiver and estoppel.[5] The defendant also denies that it violated the consent order.

[3-4] To the extent that Reader's Digest's affirmative defenses do not overlap with its more general denial of liability, the Court concludes that they do not provide a basis for avoiding liability in this case.[6] The defendant has cited no authority for the proposition that the due process clause requires the FTC to afford those subject to a consent order notice and a hearing prior to instituting a civil penalty

[1] 15 U.S.C. §§ 45(l) and 56(a)(1) (1976). Section 5(*l*) provides:

> (*l*) Any person, partnership, or corporation who violates an order of the Commission after it has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than $10,000 for each violation, which shall accrue to the United States and may be recovered in a civil action brought by the Attorney General of the United States. . . . In such actions, the United States district courts are empowered to grant mandatory injunctions and such other and further equitable relief as they deem appropriate in the enforcement of such final orders of the Commission.

Section 16(a)(1) of the Act authorizes the Federal Trade Commission ("FTC" or the "Commission") to commence a civil penalty action in its own name in the event the Attorney General fails to do so within 45 days after receipt of written notice from the Commission.

[2] Docket Item 1, ex. A, par. II.C(3).

[3] Section 5(*l*) of the Act authorizes imposition of a civil penalty of "not more than $10,000 for each violation" of an order of the FTC. The actual amount of the penalty, provided it does not exceed the statutory maximum, is left to the informed discretion of the district court judge. *United States v. J.B. Williams Co.*, 498 F.2d 414, 438 (C.A.2, 1974).

[4] Docket Items 35 and 14.

[5] Docket Item 4, pars. 11 and 12; Docket Item 9, Answers to Plaintiff's Interrogatories, Nos. 10 and 11.

[6] Reader's Digest effectively conceded as much in its opening brief, contending only that the motion to strike is premature because the affirmative defenses would be relevant to the penalty issue should liability be found. Docket Item 37, p.2 note.

action, and the Court has found none. The courts that have addressed the issue have refused to impose such a requirement.[7] The equitable defenses of laches, waiver and estoppel have no application here, because they are based on actions taken in the public interest by members of the Commission's staff. *See FTC v. Algoma Lumber Co.*, 291 U.S. 67, 80, 54 S.Ct. 315, 78 L.Ed. 655 (1933); *United States v. Vulcanized Rubber & Plastics Co.*, 178 F.Supp. 723, 726 (E.D.Pa.1959). Similarly, Reader's Digest's good faith or lack of intent has no bearing on the question of [1044] liability in this civil penalty action. *United States v. Ancorp National Services, Inc.*, 516 F.2d 198, 202 (C.A.2., 1975); *United States v. Vitasafe Corp.*, 212 F.Supp. 397 (S.D.N.Y.1962); *United States v. Karns*, 1963 Trade Cases ¶ 70,950 (S.D.N.Y.1963).

[6, 7] The Court will deny the motion to strike the affirmative defenses, however, for two reasons. First, the good faith of the defendant and the alleged lack of notice are among the factors to be considered by the Court in determining the penalty, if any, to be imposed. *See United States v. Papercraft Corp.*, 540 F.2d 131, 141 (C.A.3, 1976); *United States v. Ancorp National Services, Inc., supra*, 516 F.2d at 202; *United States v. Wilson Chemical Co.*, 1962 Trade Cases ¶ 70,478 (W.D.Pa.1962), *aff'd* 319 F.2d 133 (C.A.3, 1963). Second, this case is not unduly complicated and the Government has not shown that it is prejudiced in any way by the presence of the challenged defenses. *See Tivoli Realty, Inc. v. Paramount Pictures, Inc.*, 80 F.Supp. 800, 803 (D.Del.1948); 2A Moore's Federal Practice ¶ 12.21, p. 2431 & n. 30 (2d ed. 1975).

The Court now turns to the sole issue presented by the pending cross-motions for summary judgment; that is, whether the distribution by Reader's Digest of the Travel Check or Cash-Convertible Bond or both violated the terms of the consent order.

BACKGROUND

Congress has directed the FTC "to prevent persons, partnerships, or corporations . . . from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce."[8] Acting pursuant to this mandate, the FTC conducted an investigation in 1970 of the practices employed by Reader's Digest and several other corporations in connection with

[7] *See United States v. J.B. Williams Co., supra*, 498 F.2d at 434-35; *United States v. Beatrice Foods Co.*, 493 F.2d 1259, 1265-69 (C.A.8, 1974).

The Commission's regulations expressly provide that it may institute civil penalty proceedings to enforce compliance with an order "without prior notice of any kind to a respondent." 15 C.F.R. § 3.61.

[8] Section 5(a)(2) of the Act, 15 U.S.C. § 45(a)(2) (1976). At the time the consent order was issued, the authorization quoted in the text applied only to acts or practices "in commerce" and was codified at 15 U.S.C. § 45(a)(6) (1970). *See* Pub.L. No. 94-145, § 3, 89 Stat. 801 (1975); Pub.L. No. 93-637, § 201(a), 88 Stat. 2193 (1974).

various promotional sweepstakes. Ultimately, the Commission notified Reader's Digest that it intended to issue a complaint against the company alleging that some of its practices were unfair or deceptive and therefore in violation of section 5 of the Act. Settlement negotiations ensued and resulted in a consent order in which Reader's Digest agreed to cease and desist from most of the practice mentioned in the complaint. The consent order together with the proposed FTC complaint were issued on November 2, 1971.[9] The order became final on January 15, 1972 and, except for a modification on March 5, 1974 in respects not material to this action, the order has been in full force from that date to the present time.[10]

Paragraph II.C(3) of the consent order provides:

II

It is ordered that Reader's Digest Association, Inc., a corporation, and its officers, agents, representatives and employees, directly or through any corporate or other device, in connection with the publication, advertising, offering for sale, sale or distribution of magazines, books, or other products in commerce as "commerce" is defined in the Federal Trade Commission Act, cease and desist from:

C. . .

(3) Using or distributing simulated checks, currency, "new car certificates;" or using or distributing any confusingly simulated item of value.

The Government contends that two different items distributed by Reader's Digest in connection with the offering for sale of Reader's Digest magazine contravened [1045] Paragraph II.C(3). The first item, a "TRAVEL CHECK", was distributed during the first half of 1973 as part of a twelve-page promotional pamphlet called a "Sweepstakes Passport."[11] The Travel Check is printed on light green and blue paper, is approximately the same size as a real traveler's check, has traditional check-style borders, and purports to be for "100 Dollars a Month for Life."[12] The Government alleges that the Travel Check violates the proscription against the use of "simulated checks."

The second item is labeled a "CASH-CONVERTIBLE BOND" and it was part of a packet of sweepstakes literature distributed in November, 1973 and October, 1974.[13] As with the Travel Check, the Bond is printed against an official looking background.[14] The Government contends the Cash-Convertible Bond is a "confusingly simulated item of value" within the meaning of Pararaph II.C(3) of the consent order.

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[9] FTC Docket C-2075, reported at 79 FTC Decisions 696. The consent order and the administrative complaint are attached to the complaint in this action (Docket Item 1) as exhibits A and B.

[10] Docket Items 1 and 4, par. 5. The procedure governing the development and issuance of consent orders is set forth in 15 [sic] C.F.R. Subpart C, §§ 2.31 *et seq.*

[8] To decide whether the Travel Check or the Cash-Convertible Bond violated the order, the Court must engage in a two-step analysis: (1) determining what the order means and (2) deciding whether the challenged advertisements come within the order as construed. *United States v. J.B. Williams Co., supra,* 498 F.2d at 430-31. Furthermore, in an action to recover civil penalties the court's role is not to determine whether the challenged practice is deceptive, but merely to consider whether the practice falls within the order's proscription. *United States v. Vulcanized Rubber & Plastics Co.,* 288 F.2d 257, 258 n. 2 (C.A.3,1961); *see United States v. Morton Salt Co.,* 334 U.S. 37, 54, 68 S.Ct. 822, 92 L.Ed. 420 (1948). A dispute exists in this case, however, as to whether Paragraph II.C(3) should be construed to require some proof that prohibited advertisements actually cause consumer confusion or deception. No evidence of actual confusion has been presented with respect to either of the items in question here.

I. REQUIREMENT OF PROOF OF CONFUSION

Reader's Digest contends that the order should be construed to require at least some evidence of actual confusion or deception before an advertisement can be found to have violated the ban against using "simulated checks" or "confusingly simulated items of value." Reader's Digest points to two different sources for such an evidentiary requirement. First, it argues that the consent order by its own terms requires proof of confusion. In the alternative, it contends that the recently recognized right of commercial speech to First Amendment protection requires that the consent order be construed narrowly to require proof of confusion. The Court will consider these contentions in turn.

A. *The Consent Order*

Paragraph II.C(3) requires Reader's Digest to cease and desist from:

> (3) Using or distributing simulated checks, currency, "new car certificates;" or using or distributing any confusingly simulated item of value.

[11] Between February 26 and June 30, 1973, Reader's Digest sent out 13,898,521 of the Travel Checks. Docket Item 9, Answers to Plaintiff's Interrogatories, No. 3(b).

[12] A copy of the Travel Check appears as exhibit 1 in the appendix to this opinion.

[13] A total of 4,042,000 of the Cash-Convertible Bonds were sent out by Reader's Digest. Docket Item 9, Answers to Plaintiff's Interrogatories, No. 3(b).

[14] A copy of the Cash-Convertible Bond appears as exhibit 2 in the appendix to this opinion. Reader's Digest enclosed three different Bonds in each sweepstakes packet having face values of one hundred dollars a month for life, $2,000 a month for a year and $24,000, respectively. The three Bonds have slightly different formats but the differences are immaterial for purposes of this litigation.

The prohibition is not a model of clarity and the word "confusingly" in the second clause accounts for much of the ambiguity. It is not clear from the face of the order whether the adjective "confusingly" was intended [1046] to modify the items mentioned in the first clause of Paragraph II.C(3) as well as the second. More importantly, the language of the order does not indicate whether or not the term "confusingly" was meant to impose upon the FTC the burden of proving actual confusion to establish a violation. Resolution of these ambiguities depends upon the intentions of the FTC and Reader's Digest at the time they entered into the consent order.

The agreement containing the consent cease and desist order at issue here provides that: "The complaint may be used in construing the terms of the order."[15] The administrative complaint is particularly helpful in construing Paragraph II.C(3). In Paragraph 5 of the complaint, the Commission reproduced among other things a "check" for $100 dollars a month for life and a "New Car Certificate" for a 1970 Ford Mustang as being typical and illustrative of the statements and representations made by Reader's Digest in its sweepstakes.[16] The complaint further alleged:

PARAGRAPH 6. By and through the use of the above-quoted statements and representations, and others of similar import and meaning not expressly set out herein, respondent represented directly or by implication, that:

* * * * * *

(q) Simulated checks, "money" and other negotiable instruments and simulated "New Car Certificates" received by individuals from the respondent are valuable and can be cashed, redeemed, or exchanged for United States currency or for a new car.[17]

The complaint concludes with the averment that the aforesaid practices and others not relevant to this action have "the capacity and tendency to mislead members of the purchasing public . . . and ha[ve] induced many members of the public to participate in respondent's 'sweepstakes'," and are therefore unfair and deceptive acts or practices in violation of section 5 of the Act.[18]

[9, 10] A cease and desist order must be interpreted in light of its principal purpose. *United States v. J.B. Williams Corp., supra*, 498 F.2d at 431. When viewed in light of the administrative complaint, it is obvious that Paragraph II.C(3) was intended to prevent the distribution of simulated checks, money and new car certificates similar to those contained in the complaint and all *other* confusingly

[15] Docket Item 1, ex. C, par. 6.

[16] Docket Item 1, ex. B, pp. 6-8. A copy of the "check" shown in the administrative complaint appears as exhibit 3 in the appendix to this opinion.

[17] *Id.* pp. 9-10.

[18] *Id.* p. 14.

simulated items of value.[19] In other words, the adjective "confusingly" was meant to modify the specific items mentioned in the first clause of the paragraph and those items are simply examples of material generically described in the second clause as "confusingly simulated item[s] of value."

[11] Reader's Digest would construe the phrase "confusingly simulated item of value" to encompass only items that can be shown to have confused consumers. That is not the only possible construction, however, and the Court concludes that it does not reflect the parties' original intention. If the Government were seeking to enforce the Act's prohibition of unfair or deceptive advertising in an original administrative proceeding, it would be required to prove only that the challenged material has a tendency or capacity to deceive. Thus, the Commission's findings have been sustained despite the absence of evidence that the challenged advertising actually misled or confused customers. *See Beneficial Corp. v. FTC,* 542 F.2d 611, 617 (C.A.3, 1976), *cert. denied,* 430 U.S. 983, 97 S.Ct. 1679, 52 L.Ed.2d 377 (1977). Where, as here, the Commission issued an administrative complaint reflecting its belief that certain practices were deceptive or confusing, and then **[1047]** entered into a consent order which required the respondent to cease and desist from employing those and similar practices, it is extremely unlikely that the Commission intended to subject itself to a more rigid evidentiary burden. Nothing in the record suggests that the Commission so intended.

[12, 13] Rather, the Court finds that the Commission used the phrase "confusingly simulated" in the second clause of Paragraph II.C(3) in an attempt to generalize the proscription contained in the first clause. As the Supreme Court stated in *FTC v. Ruberoid Co.,* 343 U.S. 470, 473, 72 S.Ct. 800, 803, 96 L.Ed. 1081 (1952):

> If the Commission is to attain the objectives Congress envisioned, it cannot be required to confine its road block to the narrow lane the transgressor has traveled; it must be allowed effectively to close all roads to the prohibited goal, so that its order may not be by-passed with impunity.

The Commission had the authority to frame its order broadly to prevent Reader's Digest from engaging in similarly illegal practices in future advertisements. And having decided to enter into a consent order rather than contest the FTC's complaint, Reader's Digest "must expect some fencing in." *FTC v. Colgate-Palmolive Co.,* 380 U.S. 374, 395, 85 S.Ct. 1035, 13 L.Ed.2d 904 (1965); *see FTC v. National Lead Co.,* 352 U.S. 419, 428-30, 77 S.Ct. 502, 1 L.Ed.2d 438 (1957); *Jacob Siegel Co. v. FTC,* 327 U.S. 608, 611, 66 S.Ct. 758, 90 L.Ed. 888 (1946).

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[19] The parties do not disagree with this interpretation; they differ as to the importance of the term "confusingly."

[14] The prohibited goal in this case was the inducement of participation in sweepstakes by means of items that appeared to be valuable but in fact were not. The Court holds that the phrase "confusingly simulated item of value" in the consent order was meant to apply to advertising material that is similar to the items mentioned in the complaint and, on its face, could be said to have the same capacity or tendency to mislead consumers. Thus, the Court rejects Reader's Digest's argument that the language of the consent order should be construed to require proof of actual confusion to support a finding that either the Travel Check or the Cash-Convertible Bond violated the order.

Nevertheless, if Reader's Digest is correct in its contention that the First Amendment requires proof of confusion or deception before commercial speech can be restrained, the Court would have to resolve the ambiguity in the language of Paragraph II.C(3) in favor of such a requirement.

B. *First Amendment*

In 1942 the Supreme Court held that the First Amendment does not protect "purely commercial advertising" from government regulation.[20] Although the principal that commercial speech is unprotected was questioned and undermined by a few later decisions,[21] it survived until 1976, when the Court held in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Coun*[1048]*cil, Inc.*, 425 U.S. 748, 761-62, 96 S.Ct. 1817, 1825, 48 L.Ed.2d 346, that "speech which does 'no more than propose a commercial transaction'" is not "wholly outside the protection of the First Amendment."

[15-17] Before exploring the contours of the First Amendment interests in this case, the Court must determine whether Reader's Digest has waived its right to challenge the order on First Amendment grounds. In 1971, when it entered into the consent order, Reader's Digest waived its right to:

(a) Any further procedural steps;
(b) The requirement that the Commission's decision contain a statement of findings of fact and conclusions of law; and

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[20] *Valentine v. Chrestensen*, 316 U.S. 52, 62 S.Ct. 920, 86 L.Ed. 1262 (1942).

[21] For example, in a concurring opinion in *Cammarano v. United States*, 358 U.S. 498, 514, 79 S.Ct. 524, 3 L.Ed.2d 462 (1959), Justice Douglas described the *Chrestensen* ruling as being "casual, almost offhand." The Court expressly declined to rely on an absolute rule that commercial speech is unprotected in *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 93 S.Ct. 2553, 37 L.Ed.2d 669 (1973). There the Court upheld an ordinance prohibiting sex-designated help-wanted advertisements on the more narrow ground that the commercial activity in question was itself illegal. 413 U.S. at 388-89, 93 S.Ct. 2553. Lastly, the demise of the commercial speech exception was foreshadowed in *Bigelow v. Virginia*, 421 U.S. 809, 95 S.Ct. 2222, 44 L.Ed.2d 600 (1975), in which the Court reversed the conviction of a Virginia newspaper editor under a Virginia statute for publishing an advertisement concerning the availability of legal abortion services in New York. The Court in *Bigelow* rejected the proposition that advertising is unprotected per se, but then distinguished *Chrestensen* on the ground that the abortion

(c) All rights to seek judicial review or otherwise to challenge or contest the validity of the order entered pursuant to this agreement.[22]

Reader's Digest contends that it should not be held to have waived its First Amendment argument, because advertising did not enjoy First Amendment protection until five years after the consent order was issued. The Court agrees.

A waiver is "an intentional relinquishment . . . of a *known* right or privilege." *Johnson v. Zerbst,* 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1938) (emphasis supplied). In *Curtis Publishing Co. v. Butts,* 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed.2d 1094 (1967), a majority of the Justices of the Supreme Court found that no waiver had occurred in circumstances similar to those in this case. The *Curtis* case involved an action for defamation of a public figure; the defendant had asserted no constitutional defenses before trial. Shortly after the verdict was returned, the Supreme Court decided *New York Times Co. v. Sullivan,* 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), holding that the First Amendment requires proof of "actual malice" before a public official may recover damages for a defamatory falsehood. *Id.* at 279-80, 84 S.Ct. 710. Justice Harlan, writing for the plurality in *Curtis Publishing,* concluded that the defendant had not waived its right to assert the previously unrecognized constitutional arguments by failing to assert them before trial. 388 U.S. at 142-45, 87 S.Ct. 1975.[23] He also stated that:

> Where the ultimate effect of sustaining a claim of waiver might be an imposition on that valued freedom [of speech], we are unwilling to find waiver in circumstances which fall short of being clear and compelling:

Id. at 145, 87 S.Ct. at 1986. Prior to 1976, "purely commercial speech" like the Travel Check or Cash-Convertible Bond at issue here was not afforded First Amendment protection. *See Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., supra,* 425 U.S. at 758-61, 96 S.Ct. 1817. Therefore, for the reasons stated in *Curtis Publishing, supra,* the Court concludes that Reader's Digest did not waive its right to challenge the consent order on First Amendment grounds.[24]

(Footnote Continued)

advertisement communicated information of public interest and thus was not "purely commercial." 421 U.S. at 818-25, 93 S.Ct. 2553. *See generally Meiklejohn, Commercial Speech and the First Amendment: An Emerging Doctrine,* 5 Hof.L.Rev. 655 (1977); Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression,* 39 Geo.Wash.L.Rev. 429 (1971).

[22] Docket Item 1, ex. C, par. 3.

[23] At least two other Justices expressed approval of the plurality's requirement of a knowing waiver in *Curtis.* 388 U.S. at 172 n. 1, 87 S.Ct. 1975 (Brennan, J., with White, J., dissenting); *see id.* at 167-68, 87 S.Ct. 1975 (Warren, C.J., concurring).

[24] *See generally* Comment, *Waiver of a Previously Unrecognized Defense: Must Lawyers Be Seers,* 114 U.Pa.L.Rev. 451 (1966).

[18] Turning to the merits of Reader's Digest's constitutional argument, the Court notes first that some forms of commercial speech regulation are still permissible. Appropriate time, place and manner restrictions may be imposed on commercial speech and false or misleading advertisements may be forbidden. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., supra,* 425 U.S. at 770-72, 96 S.Ct. 1817; *Bates v. State Bar of Arizona,* 433 U.S. 350, 383-84, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977); *Linmark Associates, Inc. v. Township of Willingboro,* 431 U.S. 85, 93-94, 98, 97 S.Ct. 1614, 52 L.Ed.2d 155 (1977). In *Virginia Board of Pharmacy* the Court observed:

> Obviously, much commercial speech is not probably false, or even wholly false, but only deceptive or misleading. We foresee no obstacle to a State's dealing effectively with this problem. The First Amendment, as we construe it today, does not prohibit the State from insuring that the stream of commercial information flow cleanly as well as freely.

425 U.S. at 771-72, 96 S.Ct. at 1830 (footnote omitted). Reader's Digest does not contest the authority of the Government to prohibit the use of deceptive advertising. Instead, it argues that to justify the prohibition against the use of a particular advertisement, the Government must produce at least some evidence that the advertisement actually deceived consumers. To support this position, Reader's Digest cites *Bates v. State Bar of Arizona,* 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977), which struck down a disciplinary rule prohibiting lawyers from advertising in newspapers. In *Bates,* the State Bar attempted to justify the ban on *all* lawyer advertising on the ground that such advertising is inherently misleading. The Court examined that justification and found that, in fact, it was not true. *Id.* at 372-75, 97 S.Ct. 2691. The Court also found no support in the record for the State Bar's contention that the particular advertisement at issue in *Bates* was misleading. Thus, the advertisement was held to be protected by the First Amendment and not subject to restraint. *Id.* at 381-82, 97 S.Ct. 2691.

The instant case is distinguishable from *Bates* in two important respects. The first distinction derives from the different procedural

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(Footnote Continued)

The fact that a consent order is involved in this case does not compel a different result. *See United States v. Swift & Co.,* 286 U.S. 106, 52 S.Ct. 460, 76 L.Ed. 999 (1932) (court of equity has power to modify a consent order); *United States v. Marchetti,* 466 F.2d 1309, 1317 (C.A.4), *cert. denied,* 409 U.S. 1063, 93 S.Ct. 553, 34 L.Ed.2d 516 (1972) (one who contracts with the Government cannot unknowingly waive his First Amendment rights).

Of course, a newly recognized constitutional argument also must be asserted seasonably. In this case, the civil penalty action was commenced in July, 1975; *Virginia Board of Pharmacy* was not decided until May, 1976. Under the FTC's regulations, Reader's Digest could have petitioned for a reopening of the original administrative proceeding on the basis of a change in the law. 15 C.F.R. § 372(b)(2). Because the parties have not addressed the need for administrative exhaustion with respect to the First Amendment issue, the Court will not consider it. *See Warner-Lambert Co. v. FTC,* 562 F.2d 749, 770-71 & n. 8 (C.A.D.C.1977) (supplemental hearing on petition for rehearing).

postures of the two cases. The factual predicate for Paragraph II.C(3) of the consent order is the FTC's belief that the simulated check and new car certificate included in the administrative complaint are deceptive. Reader's Digest could have challenged the FTC's belief in an administrative hearing and then obtained judicial review of an adverse decision under the substantial evidence test. *See Beneficial Corp. v. FTC, supra,* 542 F.2d at 616-18. However, by entering into the consent order, the defendant relinquished its right to contend that the items mentioned in the original complaint were not deceptive and in violation of section 5 of the Act. *See FTC v. Jantzen, Inc.,* 383 F.2d 981, 983 (C.A.9, 1967); *United States v. Vitasafe Corp.,* 212 F.Supp. 397, 398 (S.D.N.Y.1962) and 234 F.Supp. 710, 711 & n. 2 (S.D.N.Y.1964), *aff'd,* 352 F.2d 62 (C.A.2, 1965). Therefore, this Court will assume that the check and the new car certificate were deceptive. In contrast to the situation in *Bates* then, there is at least some basis in the record of this case for concluding that the advertising being regulated is deceptive.

[19] The second distinguishing factor between this case and *Bates* is the nature of the regulation being challenged. The *Bates* case involved a prohibition against the publication of a "truthful advertisement concerning the availability and terms of routine legal services." The Court ruled "simply that the flow of such information may not be restrained." 433 U.S. at 384, 97 S.Ct. at 2709. The ban in Paragraph II.C(3) on the use of "any confusingly simulated item of value," on the other hand, does not restrain Reader's Digest from communicat[1050]ing the terms of it sweepstakes promotions to the public. The consent order merely prohibits the communication of such information in a form that the Government considers misleading or deceptive. Paragraph II.C(3), therefore, represents a restriction on the manner of speech that Reader's Digest may use to convey its message, rather than a restriction on the content of the message. "This distinction is not without significance to First Amendment analysis, since laws regulating the time, place or manner of speech stand on a different footing from laws prohibiting speech altogether." *Linmark Associates, Inc. v. Township of Willingboro, supra,* 431 U.S. at 93, 97 S.Ct. at 1618.

The other cases Reader's Digest relies upon to support its argument that to establish a violation the Government must produce at least some evidence that the Travel Check and the Cash-Convertible Bond in fact deceived or confused consumers are also inapposite. None of those cases involved "purely commercial speech,"[25] while the instant case does. In *Virginia Board of Pharamacy,* the Court stated that:

[25] Reader's Digest cited *First National Bank of Boston v. Bellotti,* 435 U.S. 765, 98 S.Ct. 1407, 55 L.Ed.2d 707 (1978), which involved a statute prohibiting banks from expending funds for the purpose of influencing the vote on

There are commonsense differences between speech that does "no more than propose a commercial transaction" . . and other varieties. . . . [,which] suggest that a different degree of protection is necessary to insure that the flow of truthful and legitimate commercial information is unimpaired. . . . [C]ommercial speech may be more durable than other kinds. Since advertising is the *sine qua non* of commercial profits, there is little likelihood of its being chilled by proper regulation and foregone entirely.

Attributes such as these, the greater objectivity and hardiness of commercial speech, may make it less necessary to tolerate inaccurate statements for fear of silencing the speaker. . . . *They may also make it appropriate to require that a commercial message appear in such a form, or include such additional information, warnings and disclaimers, as are necessary to prevent its being deceptive. . . . They may also make inapplicable the prohibition against prior restraints.*

425 U.S. at 771-72 n. 24, 96 S.Ct. at 1830 n. 24 (citations omitted) (emphasis supplied)[26] In a more recent case the Court again recognized the "commonsense differences" between commercial and other speech, stating that it has

afforded commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of non-commercial expression.

Ohralik v. Ohio State Bar Association, 436 U.S. 447, 98 S.Ct. 1912, 1918, 56 L.Ed.2d 444 (1978); *see Bates v. State Bar of Arizona, supra,* 433 U.S. at 383, 97 S.Ct. 2691; *Linmark Associates, Inc. v. Township of Willingboro, supra,* 431 U.S. at 98, 97 S.Ct. 1614. **[1051]** To determine the level of protection due the advertising material challenged in this case, the Court must undertake "the task of assessing the First Amendment interest at stake and weighing it against the public interest allegedly served by the regulation." *Bigelow v. Virginia,* 421 U.S. 809, 826, 95 S.Ct. 2222, 2235, 44 L.Ed.2d 600 (1975).

[20-23] The Government's interest in preventing the use of deceptive advertising is a legitimate and important one. As noted earlier, Reader's Digest is precluded from challenging the Government's belief that the simulated check and other items included in the administrative complaint are deceptive. Thus, the Court will assume that those items are deceptive and hence not entitled to First Amend-

(Footnote Continued)
referendums not affecting their business interests. The other two cases cited bear even less relation to the issues before this Court. *See Red Lion Broadcasting Co. v. FCC,* 395 U.S. 367, 89 S.Ct. 1794, 23 L.Ed.2d 371 (1969); *Wood v. Georgia,* 370 U.S. 375, 82 S.Ct. 1364, 8 L.Ed.2d 569 (1962).

[26] Justice Stewart expanded upon this theme in a concurring opinion in the *Virginia Board of Pharmacy* case. 425 U.S. at 777-81, 96 S.Ct. 1817.

The precise effect of the recently recognized right of commercial speech to First Amendment protection on the ability of the FTC to carry out its mandate to prevent "unfair or deceptive acts or practices in or affecting commerce" is not yet clear. A few commentators have explored the issue and come to different conclusions. *See Reich, Consumer Protection and the First Amendment: A Dilemma for the FTC?* 61 Minn.L.Rev. 705 (1977); Note, *Yes, FTC, There is a Virginia: The Impact of Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc. on the Federal Trade Commission's Regulation of Misleading Advertising,* 57 B.Univ.L.Rev. 833 (1977). *See also* Pitofsky, *Beyond Nader: Consumer Protection and the Regulation of Advertising,* 90 Harv.L.Rev. 661 (1977).

ment protection. Furthermore, it is well-settled that the FTC could frame its order broadly enough to prevent Reader's Digest from engaging in similarly deceptive practices in future sweepstakes promotions. *See FTC v. Mandel Brothers, Inc.*, 359 U.S. 385, 392, 79 S.Ct. 818, 3 L.Ed.2d 893 (1952); *National Commission on Egg Nutrition v. FTC*, 570 F.2d 157, 164 (C.A.7, 1977), *cert. denied*, 439 U.S. 821, 99 S.Ct. 86, 58 L.Ed.2d 113 (1978); *Fedders Corp. v. FTC*, 529 F.2d 1398, 1401 (C.A.2, 1976).

The fact that a violation of section 5 of the Act has been established, however, does not permit the Government to ignore First Amendment interests. In *Beneficial Corp. v. FTC*,[27] the Third Circuit reviewed a cease and desist order issued by the FTC that forced Beneficial "to abandon entirely its copyrighted and heavily promoted phrase ['Instant Tax Refund']." 542 F.2d at 618. Although the court upheld the Commission's finding that previous "Instant Tax Refund" advertising campaigns were deceptive, it refused to enforce the order proscribing use of that term or any other words of similar meaning on the ground that the order went further than was necessary to eliminate the deception. *Id.* at 620. Reader's Digest relies heavily on *Beneficial Corp. v. FTC*. The Court agrees that *Beneficial* sets forth the standard to be used in judging the constitutionality of Paragraph II.C(3), but it does not dictate the result in this case. The Third Circuit considered the copyrighted phrase "Instant Tax Refund" to be a valuable business asset which, like a trade name, could not be ordered excised completely from advertising absent a finding that qualifying language could not eliminate its offensive features.[28] The Travel Check and Cash-Convertible Bond do not possess those qualities and, therefore, do not require the same high level of protection.[29]

[24] According to Reader's Digest, its First Amendment rights would be impermissibly infringed if the consent order were construed to go beyond proscribing the use of simulated items of value that can be shown to be confusing to consumers. However, the possibility that the consent order, if not limited to provably deceptive advertising, might curtail some protected commercial speech does not necessarily mean that it is unconstitutional. On its belief that Reader's Digest had violated section 5 of the Act, the FTC was empowered to fashion appropriate restraints on Reader's Digest's future activities to avoid a recurrence of the violation. *Cf. National Society of Professional*

[27] 542 F.2d 611 (C.A.3, 1976), *cert. denied*, 430 U.S. 983, 97 S.Ct. 1679, 52 L.Ed.2d 377 (1977).

[28] *Beneficial Corp. v. FTC*, *supra*, 542 F.2d at 619-20. The court relied on *Jacob Siegel Co. v. FTC*, 327 U.S. 608, 66 S.Ct. 758, 90 L.Ed. 888 (1946), and *FTC v. Royal Milling Co.*, 288 U.S. 212, 53 S.Ct. 335, 77 L.Ed. 706 (1933), both of which described a statutory limitation on the Commission's authority, and held that the rule announced in the latter case had evolved into a general statement of constitutional principle. *Id.* at 620.

[29] The *Beneficial* case also stressed the fact that any prior restraint on speech is suspect. 542 F.2d at 619-20. When "purely commercial speech" is involved, however, the Supreme Court has stated that the prohibition against prior restraints may be inapplicable. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, *supra*, 425 U.S. at 772 n. 24, 96 S.Ct. 1817; *Ohralik v. Ohio State Bar Ass'n*, *supra*, 436 U.S. at 455, 98 S.Ct. at 1918.

Engineers v. *United States*, 435 U.S. 679, 697-98, 98 S.Ct. 1355, 55 [1052] L.Ed.2d 637 (1978). To the extent it is necessary to achieve that objective effectively, the FTC may abridge Reader's Digest's First Amendment freedoms. *Cf. id., see Warner-Lambert Co. v. FTC*, 562 F.2d 749, 763 n. 68 (C.A.D.C.1977). *cert. denied*, 435 U.S. 950, 98 S.Ct. 1575, 55 L.Ed.2d 800 (1978).

[25] In the circumstances of this case, the Court holds that Paragraph II.C(3) passes constitutional muster without a requirement of proof of deception. Given the incontestable premise that the simulated check included in the administrative complaint is deceptive, the Government's presumption that all similarly simulated items of value probably will be deceptive is not unreasonable. A prophylactic rule aimed at preventing the harm alleged in the original complaint therefore seems appropriate. In addition, the effectiveness of the Government's efforts to prevent such deception would be substantially diminished if it were required to prove actual harm. *See Ohralik v. Ohio State Bar Association, supra*, 436 U.S. at 466, 98 S.Ct. at 1924. These governmental interests substantially outweigh the free speech interests abridged by Paragraph II.C(3). The commercial speech affected does not concern a matter of important public interest. More importantly, the Court perceives little likelihood of a chilling effect on Reader's Digest's efforts to market its products by way of promotional sweepstakes, because the regulation affects only the form of the message not its content. The ban on the use of "any confusingly simulated item of value" leaves open ample alternative channels for communicating sweepstakes numbers and related information to consumers. *Compare Linmark Associates, Inc. v. Township of Willingboro, supra*, 431 U.S. at 93-94, 97 S.Ct. 1614. "It is not difficult to choose statements, designs, and devices that will not deceive." *United States v. 95 Barrels of Vinegar*, 265 U.S. 438, 443, 44 S.Ct. 529, 531, 68 L.Ed. 1094 (1924), *quoted in Virginia State Board of Pharmacy v. Virginia Citizens Consumers Council, Inc.*, 425 U.S. at 772 n. 24, 96 S.Ct. 1817. In short, the "commonsense differences" between the speech regulated by the consent order and other varieties and the fact that Paragraph II.C(3) is essentially a manner restriction make "the absence of explicit proof or findings of harm or injury . . . immaterial." *Ohralik v. Ohio State Bar Association, supra*, 436 U.S. at 468, 98 S.Ct. at 1925.

[26-29] The defendant's remaining constitutional arguments are without merit. For example, Reader's Digest correctly points out that the order must be "as specific as the circumstances will permit." *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 393 85 S.Ct. 1035, 1047, 13 L.Ed.2d 904 (1965); *National Commission on Egg Nutrition v. FTC*, 570 F.2d 157, 164 (C.A.7, 1977), *cert. denied*, 439 U.S. 821, 99 S.Ct. 86, 58 L.Ed.2d 113 (1978). The Court finds that Paragraph

II.C(3), when viewed in light of the administrative complaint, meets that standard. It is difficult to imagine how the order could have been drawn more narrowly without permitting Reader's Digest to evade its principal purpose. In the same vein, the Court is satisfied that the order gave Reader's Digest fair notice of what was proscribed. *See Grayned v. City of Rockford*, 408 U.S. 104, 109, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972). Thus, the Court rejects the argument that Paragraph II.C(3) is unconstitutionally vague.[30]

Having concluded that actual harm need not be shown to establish a violation of the consent order, the Court proceeds to consider whether either or both of the challenged items fall within the proscription of Paragraph II.C(3).

II. THE TRAVEL CHECK

[30] The Government contends that the Travel Check distributed by Reader's Digest [1053] is a "simulated check" within the meaning of the order. It is for the Court to decide whether the order in fact has been violated; no special deference is due the judgment of the FTC on this issue. *See United States v. J.B. Williams Co., supra*, 498 F.2d at 429. In accordance with the terms of the consent agreement,[31] the Court will look to the administrative complaint for assistance in construing Paragraph II.C(3). Otherwise, the terms "simulated check" and "confusingly simulated item of value" will be given their ordinary meaning.

[31] Webster's New World Dictionary (2d College ed. 1976) defines "simulate" as a verb meaning "1. to give a false indication or appearance of; pretend; feign . . . 2. to have or take on the external appearance of; look or act like." According to the The Random House College Dictionary (1973), "simulate" means "to assume or have the appearance or characteristics of; imitate." A traveler's check is a widely recognized type of check. Reader's Digest's "Travel Check," which appears as exhibit 1 in the appendix to this opinion, has the appearance of or imitates a real traveler's check or, at least, gives a false indication of being one; therefore, the Court concludes that it is a simulated check.

To violate the order as construed here, however, the Travel Check must be a "confusingly simulated check." In the present context, the word "confusingly" denotes that the challenged item must have a capacity to confuse or mislead consumers comparable to that of the "check" included in the administrative complaint. (A copy of the

[30] It is unclear whether Reader's Digest is challenging the order on grounds of overbreadth as well. Such an argument would not be well-founded, because the doctrine of overbreadth "applies weakly, if at all, in the ordinary commercial context." *See Bates v. State Bar of Arizona, supra*, 433 U.S. at 380, 97 S.Ct. at 2707; *Ohralik v. Ohio State Bar Ass'n, supra*, 436 U.S. at 462, 98 S.Ct. at 1922 n. 20.

[31] Docket Item 1, ex. C, par. 6.

"check" appears as exhibit 3 in the appendix.) Several striking similarities between the Travel Check and the original check make the conclusion that the former is confusingly simulated almost inescapable. Both items are the approximate size of actual checks and have been printed on colored paper with traditional check-style borders in an obvious attempt to create an air of authenticity. The check states "Pay the sum of $100 DOLLARS A MONTH FOR LIFE" directly above the recipient's name, while the Travel Check provides that the same sum "will be paid to the order of:" the recipient. Both items contain legends in small type stating that they are "not negotiable" and instructing the recipient that he must return the entire sweepstakes package to be eligible to win. The Travel Check contains three sweepstakes numbers; the original check informs the recipient that he has been selected to receive six "Lucky Numbers."

Reader's Digest points to several differences between the original check and the Travel Check to support its argument that the latter is not prohibited.

> For example, the original "check" contained a number in the upper right hand corner in the same way that a real check would be numbered. The "check" said: "Pay the sum of", followed by printed numerals and letters similiar to the printing that would be used on a real check. Following that printing, the "check" contained a line where there appeared the handwritten amount as would appear on an actual check. It also included the phrase "non-transferable" and stated: "Valid only if returned before March 24." Finally, as with a real check, the "check" contained a signature line and a place for the date and was blank on the back side.

Defendant's Opening Brief, Docket Item 37, p. 34. The Court finds these differences insignificant.[32] The FTC "is not limited to [1054] prohibiting the illegal practice in the precise form in which it [was] found to have existed in the past." *FTC v. Ruberoid Co., supra,* 343 U.S. at 473, 72 S.Ct. at 803. The principal purpose of the consent order was to prevent the distribution of any confusingly simulated item of value, not just the items specifically mentioned in the administrative complaint. That purpose would be frustrated if Reader's Digest were able to avoid the order's proscription by using such slight changes in wording and minor variations in format. *See United States v. Vulcanized Rubber & Plastics Co.,* 288 F.2d 257, 259-60 (C.A.3, 1961), *aff'g* 178 F.Supp. 723 (E.D.Pa.1959); *In re Whitney & Co.,* 273 F.2d 211, 214 (C.A.9, 1959).

[32] One flaw in the defendant's reasoning is its assumption that most members of the general public have a detailed knowledge of what an actual traveler's check looks like. The Court is unwilling to make that assumption.

With respect to the fact that the reverse sides of the Travel Check and the Cash-Convertible Bond contain advertising copy, the Court notes first that the faces of both items are complete in themselves. Moreover, the placement of the Travel Checks as the center page of a twelve-page sweepstakes pamphlet makes it unlikely that the consumer would notice the printing on their reverse sides. Finally, the printing on the back of the Cash-Convertible Bond does not detract from its appearance of authenticity, since many real bonds have print on their reverse sides.

[32, 33] Reader's Digest's allegation that it made the changes noted above in order to insure that the Travel Check could not be mistaken for an actual check is irrelevant. As the Supreme Court stated in *FTC v. Colgate-Palmolive Co., supra,* 380 U.S. at 393, 85 S.Ct. at 1047:

> If respondents in their subsequent commercials attempt to come as close to the line of misrepresentation as the Commission's order permits, they may without specifically intending to do so cross into the area proscribed by this order. However, it does not seem "unfair to require that one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line." *Boyce Motor Lines, Inc. v. United States,* 342 U.S. 337, 340, 72 S.Ct. 329, 96 L.Ed. 367.

Finally, Reader's Digest argues that the Travel Check, which was part of a twelve-page sweepstakes pamphlet, does not have a tendency to deceive. To assess the tendency of the Travel Check to deceive, the Court must consider the advertising as a whole. *Beneficial Corp. v. FTC, supra,* 542 F.2d at 617. Reader's Digest distributed the Travel Check in a pamphlet labeled a "Sweepstakes Passport," which was designed to look like a United States passport.[33] Two of the Travel Checks were printed on one side of a single sheet of paper and that page became the center page of the pamphlet. The Travel Checks are complete in themselves and would most likely be the first things to draw the attention of a consumer who quickly perused the pamphlet. Thus, the Court concludes that the tendency of the Travel Check to deceive consumers, at least initially, is not significantly affected by the information provided on the other pages of the pamphlet. In this respect, it is noteworthy that the Commission considered the check included in the administrative complaint deceptive and it too was part of a multi-page mailing.[34]

It is reasonable to presume that some people who would have discarded the pamphlet without even reading it, might have been induced to examine it more closely simply because they were confused as to whether the Travel Check was actually valuable. Still others, although probably a lesser number, may have believed the Travel Checks were valuable even after reading the pamphlet.

[34, 35] In determining whether advertising has a tendency or capacity to deceive the Court must consider the audience to which it is directed. *See Bates v. State Bar of Arizona, supra,* 433 U.S. at 383 n. 37, 97 S.Ct. 2691. In this case, the audience is the general public, which has been defined to include:

> the ignorant, and unthinking and the credulous, who, in making purchases, do not stop to analyze but too often are governed by appearances and general impressions

[33] Docket Item 37, ex. A.

[34] *See* Docket Item 1, ex. B, pp. 4-8.

Beneficial Corp. v. FTC, supra, 542 F.2d at 618 n. 11 (quoting 1 Callman, Unfair Competition and Trademarks § 19.2(a)(1) at 341-44 (1950)); *see Charles of the Ritz Distributors Corp. v. FTC,* 143 F.2d 676, 679 (C.A.2, 1944). In the circumstances of this case, where Reader's Digest has waived its right to contend that items like the check included in the original complaint are not confusingly simulated items of value, the [1055] Court concludes that the Travel Check has a sufficient capacity to deceive to be held in violation of the order. There is no basis for concluding that the Travel Check is likely to be significantly less deceptive than the original check.

III. THE CASH-CONVERTIBLE BOND

[36] The Government contends that the Cash-Convertible Bond is a "confusingly simulated item of value" within the meaning of Paragraph II.C(3). The Court agrees for many of the same reasons given in relation to the Travel Check. The Cash-Convertible Bonds, an example of which appears as exhibit 2 in the appendix, have many of the same characteristics as the original check, including: scroll-like borders, an official-looking background and a notation that they are non-negotiable. Also, the three bonds challenged in this action could be interpreted as giving the person in whose name they are registered $100 dollars a month for life, $2,000 a month for a year or $24,000, respectively.[35] In short, the Bonds were made to look like financial instruments.

Reader's Digest points out that there is no such thing as a "cash-convertible" bond. The Court, however, takes judicial notice of the generaly known fact that "convertible bonds" are a common financial instrument. F.R.Evid. 201. Furthermore, the Court considers it unlikely that the majority of the general public, much less "the ignorant, and unthinking and the credulous," would appreciate the significance of the distinction between cash-convertible and convertible bonds.

The three Cash-Convertible Bonds were distributed in an envelope which contained three other certificates as well. After examining the Bonds in the context of the entire promotional packet, the Court concludes that they are likely to possess a tendency to deceive comparable to that of the original check; therefore, their use violated Paragraph II.C(3).

CONCLUSION

Reader's Digest entered into a consent cease and desist order that prohibited it from distributing "simulated check" or "confusingly

[35] Docket Item 1, ex. E, pp. 11, 13 and 15.

[36] Of course, Reader's Digest may still press its arguments of good faith, laches, estoppel and lack of harm to the public in connection with the penalty phase of this litigation.

simulated item[s] of value." Thereafter, it distributed a "Travel Check" and certain "Cash-Convertible Bonds" in connection with its sweepstakes promotions. The Government contends these items violated the consent order and now seeks assessment of a civil penalty. Contrary to Reader's Digest's position, the Court neither construes the order as requiring proof that the challenged items actually confused consumers nor concludes that the First Amendment mandates such a construction. Finally, because the distribution of both the Travel Check and the Cash-Convertible Bond violated the order, the Government is entitled to partial summary judgment on the issue of liability.[38]

An order will be entered in accordance with this opinion.

[38] Of course, Reader's Digest may still press its arguments of good faith, laches, estoppel and lack of harm to the public in connection with the penalty phase of this litigation.

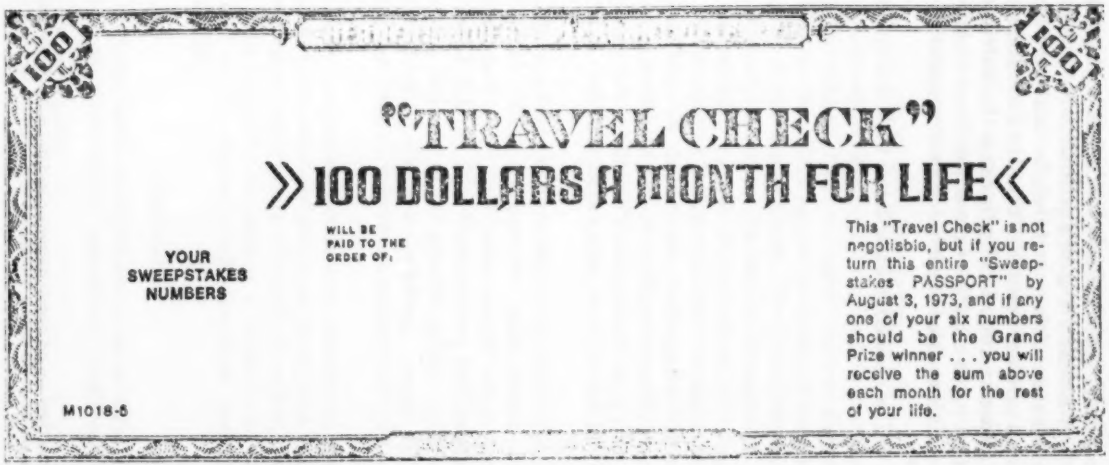
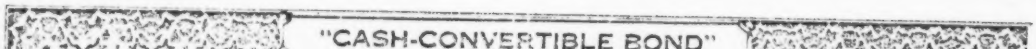

100
100
"TRAVEL CHECK"
»100 DOLLARS A MONTH FOR LIFE«
YOUR SWEEPSTAKES NUMBERS
WILL BE PAID TO THE ORDER OF:
This "Travel Check" is not negotiable, but if you return this entire "Sweepstakes PASSPORT" by August 3, 1973, and if any one of your six numbers should be the Grand Prize winner . . . you will receive the sum above each month for the rest of your life.
M1018-5

EXHIBIT 1


"CASH-CONVERTIBLE BOND"

"CASH-CONVERTIBLE BOND"
G 789084 THIS IS YOUR SIXTH SWEEPSTAKES NUMBER
$2,000.00 A MONTH
FOR A YEAR
Notice: To have six chances to win any of 5,796 Sweepstakes prizes, including $2,000.00 A MONTH FOR A YEAR, return all six of your "Bonds" in the enclosed envelope by December 9, 1974.
This "Bond" is registered exclusively in your name . . . and—if any one of your six Sweepstakes Numbers enclosed is the Grand Prize winner in this Sweepstakes—it is convertible to cash in the amount of $2,000.00 a month for a year (or $100.00 a month for life or $24,000.00 cash, if you prefer).
LO-4-2
Registered in the name of:
72447
Carolyn Davis
NON-NEGOTIABLE
READER'S DIGEST $125,000.00 CHRISTMAS HOLIDAY SWEEPSTAKES

EXHIBIT 2

APPENDIX—Continued

AWN-869

READER'S DIGEST $250,000.00 SWEEPSTAKES

If you are an Early Bird Prize winner—Reader's Digest guarantees to deposit each month in your personal account the below-mentioned sum at your local bank (or any other bank you may designate).

NO

Pay the sum of $100 DOLLARS A MONTH FOR LIFE $100 00/100

You have been selected to receive
2☐ 3☐ 4☐ 5☐ 6☒ 7☐
Lucky Numbers.
See next page.

This check is not negotiable. But if you return it by March 24, 1969, and one of your Lucky Numbers is the early bird prize winner...you will receive the sum above each month for the rest of your life. Mail back this entire Sweepstakes Book today. SEND NO MONEY.

NON-TRANSFERABLE

VALID ONLY IF RETURNED BEFORE

Carolyn Davis ON THIS DATE

EXHIBIT 3

W.L. WEARLY, INGERSOLL-RAND COMPANY, The TORRINGTON COMPANY v. FEDERAL TRADE COMMISSION et al.*

Civ. A. No. 77-1860. F.T.C. File No. 99-374.

(United States District Court, District of New Jersey, November 29, 1978)

In a subpoena preenforcement action, court entered a Final Judgment consisting of a "Declaratory Judgment" in favor of plaintiffs and a "Protection Order" which specified the terms and conditions upon which documents subpoenaed by the FTC would be made available for inspection at Ingersoll's headquarters in New Jersey.

Before BIUNNO, *District Judge.*

MEMORANDUM

An opinion on the merits was entered October 18, 1978 (later supplemented with footnotes due to time constraints). In that opinion, the court set November 3, 1978 for a hearing on the form of final judgment in view of a number of unique aspects (e.g., the deliberate refusal of defendants to comply with court orders of a procedural nature, such as giving notice to specified persons of their right to intervene).

At the hearing, both sides were granted leave to make submissions on or before November 13, 1978 of their drafts of proposed judgment. In addition, defendants were granted leave to make a submission for reconsideration on the decision itself at the same time, thus overlapping two time periods for expedition, since a motion for reargument or reconsideration could have been served and filed within 14 days after entry of the final judgment under the General Rules of this District.

At the hearing in respect to judgment, defendants focused argument on the decision itself, rather than on the form of judgment to carry out the decision. As well as it could, the court tried to make it clear that defendants should make presentation as though the opinion rendered had already withstood assault in the Court of Appeals and in the Supreme Court. It referred to the old saying that a party may lose the opinion and win the judgment.

Yet, when defendants' papers were received (three days late), they not only confined themselves to reargument, but the three drafts of proposed judgment were all of a kind that assumed the exact op-

*Not otherwise reported.

posite of the court's opinion. Defendants submitted no draft judgment embodying the determinations made.

Plaintiffs submitted a memorandum pressing the importance of separately adopted findings of fact and conclusions of law, despite the court's reference to the fifth sentence of F.R.Civ.P. 52(a), that: "If an opinion . . . is filed, it will be sufficient if the findings of fact and conclusions of law appear therein." They also submitted a draft of final judgment.

None of the materials submitted is entirely satisfactory. No suitable draft of judgment was submitted by defendants, and the court is of the view that the plaintiffs' draft carries some semantic difficulties.

The court is also aware of the pendency of related matters in the Court of Appeals for the District of Columbia, having been supplied with a copy of the argument transcript of October 20, 1978, as well as with a copy of that court's slip opinion in *Exxon v. F.T.C.*, #77-1302, decided October 19, 1978 (the day before the oral argument there). The oral argument of October 20, 1978 indicates that the District of Columbia panel had not had time to digest the opinion in this court of October 18, 1978, and counsel learned of the *Exxon* decision of October 19, 1978 at the argument.

The most efficient course, in view of these rapid developments, is to resolve the form and enter final judgment here as the first step, reserving the entry of formal findings of fact and conclusions of law as the second step, simply because the first step can be moved through the typewriter more quickly than the second, and because the first step starts the clock running for appeal from the final judgment.

The third step, which is review of the submission on reargument or reconsideration should be last because it will take more time than the first two steps, and dealing with it will not slow down the process of appellate review.

In preparing its own version of the final judgment, the court feels it prudent to reserve jurisdiction for later consideration the matters of contempt (for defendants' failure to comply with procedural orders) and of sanctions (for refusal to submit for review, under thoroughly protected conditions, the 152 documents of defendants sought by plaintiffs and ordered produced nearly a year ago, so that claims of qualified privilege raised by defendants could be evaluated).

A mingling of these aspects with the disposition of the merits is felt to have too much risk for confusion. From their submissions, it is utterly clear that defendants took the course they did in this regard with full awareness of the potential consequences. Of course, the basic rule is "Fiat Justicia Ruat Coelum", and "Equal Justice Under

Law." The agencies and officials of government are not favored suitors, and stand as equals with the most lowly citizen before the bar. Yet, considerations of comity as well as the quite startling nature of the posture taken by defendants demand that these aspects be considered separately and with careful deliberation. If plaintiffs be right in the charges they make in these regards, there is time enough to deal with them, and to afford defendants a final "locus penitentiae." The wheels of justice may seem to grind slowly, but they grind woe, for someone.

Throughout this case, the court tried to make clear (without prejudging any issue) that defendants were free—nay, they were invited—to press their subpoena enforcement claim here as a mandatory counterclaim, or even as a permissive counterclaim. Had they chosen that course, defendants would very likely have had the contested documents, in all five categories, in the District of Columbia subject to a suitable protective order.

This court made it clear throughout that it had no interest or desire to impede the non-public investigation while considering the substantial claims of plaintiffs at an unavoidable constitutional level. Yet, for a number of months since the disputed documents were placed in custodia legis and made available to defendants for both the purposes of this case and for the non-public investigation, defendants have chosen not even to pick up the keys reserved for them, much less to look at the documents to decide which, if any, were of interest.

The court repeatedly made clear that the terms of the protective order remained subject to change on a proper showing that could only be made after inspecting the documents. Why this course was not followed can only be termed "baffling".

Despite this, the court is of the view that there should not be an injunction, but that the means for inspecting the documents should be continued and with leave to apply for modification of the terms.

It is common experience that, with massive collections of documents only a small percentage is likely to be relevant or of significant weight. Huge masses of information, like accumulations of minerals, have a mother lode or a vein rich in ore. The rest is mostly tailings or slag. A first sifting under the existing orders should have long ago confined the need to know to some small fraction of the whole, unless, of course the digging turned up nothing more than fool's gold (iron disulphide or pyrites).

The court is also aware of the fact that, in connection with the problem of Congressional requests for agency file information, the two Houses are still in disagreement in the effort to construct a workable mechanism.

In passing S.555 in October of this year, the Conference Committee noted that while the Senate had twice voted to establish a civil

judicial procedure for enforcement of Congressional subpoenas, the appropriate House committees had not considered the proposal, and so the bill as passed deals only with Senate subpoenas and leaves House subpoenas subject to the same unresolved and difficult questions already noted. See Cong. Rec., No. 165, Part II (October 11, 1978) at p. H 12308.

These, and other delicate considerations noted on the record throughout this case have been taken into account in formulating the final judgment.

FINAL JUDGMENT

This matter having come to trial by the court without a jury on various dates, beginning October 17, 1977 and continuing thereafter as criminal jury trial demands allowed, and having concluded on July 13, 1978 for the reasons set forth in the record of the case, and reflected in the Opinion, dated October 18, 1978, it is on this 29 day of November, 1978

ORDERED, ADJUDGED, and DECREED that:

Part I

DECLARATORY JUDGMENT

1. This plenary action is an action in which declaratory relief as well as other and further relief may properly be granted under the Constitution, statutes and law; jurisdication exists and venue is proper.

2. The information contained in the documents placed in the custody of this Court by its order of April 21, 1978 as particularized in later orders, in the five categories particularized in the record, are the subject matter of this action, and are determined to constitute and contain proprietary trade secret and confidential financial and business information (hereinafter referred to as "proprietary information") which is the property of plaintiffs Ingersoll-Rand and Torrington.

3. The documents and the proprietary information contained therein are entitled, under the 5th Amendment to the Constitution, the statutes and the law of New Jersey to protection from taking by government for private use by unauthorized disclosure, or for public use without just compensation.

4. Defendants' policies, procedures and Rules of Practice, as related to the FTC subpoena *duces tecum* dated September 15, 1976, issued to plaintiff W.L. Wearly (not the owner of the property) in connection with non-public investigation 751-0025, fail to accord any privately enforceable protection to the proprietary information. Disclosure of the documents and the proprietary information pursuant to the subpoena without suitable protection to accompany disclosure presents

and constitutes an imminently real and substantial risk of irreparable injury warranting judicial determination and decision of the controversy.

5. The disclosure of such proprietary information to defendants without suitable protection to accompay disclosure would constitute a taking of property within the meaning of paragraph 3 above, and would expose plaintiffs to the risk of irreparable injury within the meaning of paragraph 4 above.

6. Any claim which the FTC is authorized to make for judicial enforcement of the subpoena *duces tecum* has been determined to be a compulsory counterclaim under F.R.Civ.P.13(a) under the circumstances of this action. Defendants failed to make any claim for enforcement of the subpoena in this action, and failed to inspect the documents, although inspection was made available, both for the purposes of this action (at defendants' request) and for the purposes of said non-public investigation.

7. Under the specific facts of this case, Wearly acted as a fiduciary of property belonging to others and was not and is not required to produce the documents and proprietary information now in the custody of this Court, in response to said subpoena without suitable protection to the owners thereof.

8. No subpoena having been issued to Ingersoll-Rand or Torrington, they were not and are not required to submit said documents and proprietary information to Wearly (their fiduciary) for delivery to the FTC, nor are they required to deliver said documents and proprietary information in response to said subpoena without suitable protection of their property therein.

9. Pending final determination on appellate review of this judgment, all said documents and proprietary information shall remain in the custody of this Court. No party shall have access thereto except by order of this Court on written motion and notice, good cause therefor having been shown, except as hereafter provided.

Part II

Pending final determination after appellate review, access to the documents and proprietary information will continue to be made available to defendants pursuant to the following protective order provisions, which are a continuation of the order of April 21, 1978 and the later particularizations thereof.

PROTECTIVE ORDER

1. All information contained in documents placed in the custody of this Court by prior orders of this Court, and all information in

documents which may hereafter be placed in the custody of this Court, if any, are retained in the custody of the court, and plaintiffs are ordered to keep and maintain each and all of the documents safely and securely in their present locations, and are not to destroy or discard any of them, without leave of court, on notice or consent.

2. Defendants are granted access to all information whether in the custody of the court or furnished by answer to interrrogatory, under seal, for further proceedings herein or for the purpose of conducting non-public investigation 751 0025, subject to the terms of this Order. Defendants shall neither copy any of the same nor carry away excerpts, notes or summaries thereof except as provided in paragraph 23 below of this Order.

3. Access to any information, whether in the custody of the Court or furnished by answer to interrogatory under seal, shall be limited to persons in the employ of the Federal Trade Commission and shall be limited exclusively to those employees who have a need to know the information in the course of performing their official duties and obligations for the purposes specified in paragraph 2 above and to independent expert consultants engaged by defendants. All such persons seeking access shall execute and file with this Court an affidavit that he (she) has read a copy of this Final Judgment and understands that he (she) is bound to obey the terms thereof, and that any failure to do so may be a contempt of Court, and containing an express consent and waiver in such form as is first approved by the Court.

4. Plaintiffs shall not furnish copies of any information whether in the custody of the Court or furnished by answer to interrogatory, under seal, to any third parties (other than the Custodian and such persons to whom disclosure is ordinarily made under privileged conditions, whether by law or by express or implied agreement) including defendants, whether or not the same is the subject of any other action or proceeding in this or in any other jurisdiction, without further order of this Court.

5. Counsel for plaintiffs may be present at any time that defendants' above-authorized representatives inspect any of the documents in the custody of this court, provided, however, that such counsel shall not be privy to or interfere with their work or private deliberations.

6. No keys to the locked cabinets used to contain the documents in the custody of this Court, which are authorized to be delivered to representatives of plaintiffs, defendants and the Custodian, shall be duplicated by any person without the Order of this Court.

7. The independent accounting firm of Price, Waterhouse & Co., 411 Hackensack Avenue, Hackensack, N.J. is continued as Custodian under this Final Judgment. Compensation for its services and

disbursements shall be paid by plaintiffs Ingersoll-Rand and Torrington, except as hereafter provided.

8. The documents to be held by the Custodian shall be kept and maintained in metal file cabinets placed in Room No. 2236, 2nd Floor, 200 Chestnut Ridge Road, Woodcliff Lake, New Jersey 07676.

9. The Custodian shall cause the said file cabinets and the tags of the keys to the locks thereof to have affixed a suitable "Official Notice" stating that the cabinets and their contents are in the custody of this Court in this action with access limited in accordance with Orders heretofore, now or hereafter entered, and bearing the name of the Custodian.

10. Until such time as defendants indicate their readiness to undertake inspection of the said documents, the Custodian shall retain possession of all keys to the said cabinets, and shall have sole access of their contents for the sole purpose of storing the same, and for the purpose of adding thereto any other or further documents delivered to it by plaintiffs from time to time, if any.

11. At such time as defendants make their first visit to inspect said documents, the Custodian shall deliver cabinet lock keys Nos. S-100 and S-112 to Mark W. Haase, Esq., on behalf of defendants, and cabinet lock keys Nos. 3464 and 3197 to Norman Pacun, Esq., on behalf of plaintiffs. The Custodian, through Mr. Dominic J. Iorio, shall retain cabinet lock keys Nos. 3 and 6, as well as the key to Room 2236.

12. Access for inspection of the said documents shall be provided by the Custodian on any business day, Monday through Friday, between the hours of 8:30 AM and 4:30 PM (less one hour for lunch) unless the parties and the Custodian agree upon other hours and days, to be recorded by the Custodian. Visits for inspection of said documents shall be on 3 business days' notice by letter, telegraph, mailgram or telephone to the Custodian, who shall notify the plaintiffs thereof, unless the Custodian agrees to shorter notice. A single notice may be given for more than one day's visit.

13. Every person seeking access for inspection shall, on the first visit, execute an affidavit or certificate under penalty of perjury stating that he or she has been made aware of the protective orders entered by the Court in this suit, understands that he or she is bound to obey the same and that any failure to do so may be a contempt of court and shall contain express waivers and consents in such form as is first approved by the Court. The same shall be retained by the Custodian unless otherwise ordered by the Court, and it shall then file all of the same as part of its Report.

14. The Custodian shall prepare and retain a suitable form of journal sheet or log for the entry of each date of inspection, the names of the persons attending, on whose behalf, in what capacity, arrival and

departure time, and the name of the Custodian's representative present. Each person so listed shall initial the entry and may be required by the Custodian to exhibit suitable identifying credentials.

15. The Custodian shall prepare and maintain a suitable form of log upon which to record any documents removed from the cabinets for inspection as may be requested and to verify their return. Only the Custodian is authorized to remove and return documents. Requests shall be by document number as shown by the list prepared by the Custodian. More than one document may be included in the same request. The log shall record the date of the inspection, the document numbers, the person making the request, the time of issuance and the time of return. Both time entries shall be initialled by the requestor and the Custodian.

16. The Custodian shall be present at all times during document inspection. A representative of plaintiffs may, but need not, be present during document inspection but shall be available to open and close locks on each day, and to examine the journal and document log to avoid any question that documents removed have been returned after inspection. During luncheon recesses the parties and the Custodian may agree to leave documents being inspected on a desk or table or in a drawer or container in Room 2236 without returning them to the cabinets at that time, so long as the room is locked by the Custodian during the recess and a record of the agreement entered on the journal. In the alternative, documents being inspected may be placed together in a temporary folder and returned to the cabinets for locking during such recess. Neither the Custodian nor any representative of plaintiffs present during any inspection visit shall be privy to or interfere with the inspection work or with private deliberations.

17. The Custodian shall be responsible for the numbering of documents and for their retention in the cabinets in orderly fashion for convenient access, as well as to verify the presence of documents delivered to it. It shall provide any document requested and see to its return. It shall see that the cabinets are locked at the end of each day's inspection, that all persons have vacated Room 2236 and that the same is then locked.

18. The Custodian shall not be responsible nor be liable in any way for the preservation and safety of said cabinets or their contents except insofar as it fails to comply with its duties and functions as expressly stated herein. The Custodian shall have no responsibility or liability for non-compliance by any other person with the orders of the Court or with any affidavit or certification made hereunder. In no event shall the Custodian have any liability for any occurrence, event or incident contributed to by Act of God, fire, lightning, flood, escape of water, accident or any occurrence, event or incident in the nature of a force majeure, or for any unauthorized entry into Room 2236, or for

any unauthorized theft, copying or disclosure of any of the documents contained in said cabinets and room.

19. In the event that plaintiffs shall locate additional documents after the Custodian has distributed the cabinet lock keys, and are unable to secure the attendance of a representative of defendants for their deposit into the cabinets, the same shall be delivered to the Custodian and an application made on 5 days' notice for an order to resolve the matter.

20. Leave is granted to each party, and to the Custodian, to apply to the Court on 5 days' notice for an order dealing with any problem then arising not dealt with by any order of the Court then in force. If the problem arises during an inspection visit, while representatives of the parties and the Custodian are all present, application for instructions may be made by telephone, with a written verbatim record thereof.

21. At such time or times as the Court may direct by Order, the Custodian shall prepare, serve and file a Report of its performance and activity.

22. If after inspection of the information, whether in the Court's custody or furnished by answer to interrogatory under seal, defendants wish to copy any part of the same, or to carry away excerpts, notes, or summaries thereof, or make privileged disclosure thereof, defendants shall make application to this Court for permission to make such copies or disclosure.

23. Upon leave of this Court first obtained, defendants may copy such of the information in the Court's custody or furnished by answer to interrogatory under seal, or carry away excerpts, notes, or summaries thereof, or may make privileged disclosure thereof, subject to the following conditions:

(a) Information so obtained may be used by defendants exclusively for the purpose of this case or for the purpose of conducting non-public investigation 751 0025, and may not be revealed to anyone other than to those employees of defendants who have a need to know the information in order to perform their official duties and obligations, or to independent expert consultants engaged by defendants without leave of this Court, on such terms and conditions as may be specified in the order granting leave.

(b) At the conclusion of non-public investigation 751 0025, all copies of information so obtained by defendants shall be returned to plaintiffs Ingersoll-Rand or Torrington, except that if defendants determine to bring a complaint or other action on the basis of its investigation, then defendants may apply to this Court for permission to use such information in such proceedings, subject to the terms of

an appropriate protective order to be submitted to this Court for approval.

(c) Leave is granted to defendants to apply for an order providing means for physical transfer of the proprietary information documents which are the subject hereof to a location within the District of Columbia, under terms and conditions for control by the Custodian there substantially equivalent to the terms hereof, at defendants' expense, and on terms and conditions first approved by this Court.

(d) In the event that defendants shall receive any request for any data which are the subject hereof under the Freedom of Information Act, they shall inform the requester that the data are in the custody of the Court, and that application for the same may be made to this Court, on 10 business days' notice in writing to the parties hereto, and leave to make application on such short notice is hereby granted.

(e) In the event that defendants shall receive any request for data which is the subject hereof from any Committee or subcommittee of the Congress authorized to issue subpoena therefor, they shall inform the requester to the same effect and tenor as in the case of Freedom of Information requests. Copy of the request and reply shall also be furnished to the Attorney General of the United States if the request originates from the House of Representatives, and the Office of Senate Legal Counsel (Title VII of S. 555, as enacted) if the request originates from the Senate.

(f) No disclosure of data subject to this judgment shall be disclosed to any other agency of the United States without leave of Court first obtained.

Part III

This Court retains jurisdiction over this action for all purposes, including but not limited to (a) other and further relief, (b) the resolution of any dispute that may arise concerning the interpretation and requirements of this judgment or of any order entered pursuant hereto, and (c) matters involving contempt of court, and the imposition of sanctions for refusal to comply with orders related to discovery.

Consideration and disposition of defendants' motion for reconsideration of the rulings already made are reserved, and are ordered decided without further oral argument under F.R.Civ.P. 78.

MOBIL OIL CORPORATION
v.
FEDERAL TRADE COMMISSION et al.*

74 Civ. 311. F.T.C. Docket No. 8934.

(United States District Court, Southern District of New York, December 7, 1978)

In an FOIA action instituted by an oil company seeking disclosure of various documents generated by the FTC in the course of its antitrust investigation of the petroleum industry, court held that the Commission may withhold the names of all persons who had complained of possible antitrust law violations committed by oil companies, since there was no practical means of distinguishing between complainants who expected confidential treatment for their communications and those who did not. Also protected from disclosure under FOIA attorney work product exemption were litigation-oriented interview reports prepared for agency files by staff attorneys. However, the Commission was required to disclose a limited number of its communications with other federal agencies.

Andrew J. Kilcarr, Thomas R. Trowbridge, III, Donovan, Leisure, Newton & Irvine, New York City, for plaintiff.
Robert B. Fiske, Jr., U.S. Atty., *Richard J. McCarthy,* Ass't U.S. Atty., for defendants.

Before LASKER, *District Judge.*

In an order dated February 4, 1977, 430 F.Supp 849 (S.D.N.Y. 1977), we called upon the Federal Trade Commission to submit affidavits substantiating its claim that certain documents plaintiff Mobil Oil Corp. seeks to inspect and copy are exempt from the disclosure requirements of the Freedom of Information Act (FOIA), 5 U.S.C. § 552. The court held that Mobil would be entitled to the documents in the event that the FTC failed to file such affidavits within thirty days. The court has examined the affidavits submitted by the Commission and determined whether the documents must be made available to Mobil.

Item II

The Commission has classified the various documents that have been in issue during this litigation into six categories. Item II consists of communications to the FTC and other federal and state agencies from members of the public complaining of possible antitrust law violations committed by oil companies. The FTC has agreed to

*Not otherwise reported.

release the substance of these communications but has resisted disclosure of the names of the persons who lodged complaints and of other information that would serve to identify those persons.

The FTC has argued that these persons are "confidential sources" within the meaning of Exemption 7(D) of FOIA, 5 U.S.C. § 552(b)(7)(D), which protects from disclosure "investigatory records compiled for law enforcement purposes . . . to the extent that the publication of such records would . . . disclose the identity of a confidential source . . . " The legislative history of Exemption 7(D) indicated that a "confidential source" is a "person [who] provided information under an express assurance of confidentiality or in circumstances from which such an assurance could be reasonably inferred." *Conf. Rep. No. 93-1200,* 93d Cong., 2d Sess. (1974), reprinted in [1974] *U.S. Code Cong. & Ad. News* 6285, 6291.

In its earlier decision the court found that some of the persons whose identities the agency sought to protect clearly were not confidential sources within the meaning of Exemption 7(D) and that certain others clearly were confidential sources. Decision was withheld as to certain retail gasoline dealers and their representatives who had sent letters to governmental agencies complaining of the conduct of their suppliers. These letters do not, on their face, indicate that the writers had been expressly or impliedly promised anonymity. The agency was ordered to submit an affidavit explaining the basis for its claim that these parties are nonetheless confidential sources.

In its affidavit submitted in response to the court's order, the FTC concedes that none of these complaining parties was given an express promise of confidentiality. The agency states that promises of confidentiality are, however, inferrable because it is the recognized policy of the FTC not to disclose the names of complaining parties, *see* 16 C.F.R. § 2.2(d). That policy, according to the Commission, gave rise to a "legitimate expectation of confidentiality."

The Commission has provided no factual or evidentiary support showing that these dealers were aware of that policy and had no reason to believe that the Commission would deviate from it in handling their communications. It is, however, reasonable to assume that some of the dealers did proceed on the expectation that the Commission would treat their communications as confidential. Because no practical method has been suggested to distinguish dealers who expected such confidentiality from those who did not, there seems in the circumstances no alternative but to accord them confidential status. Accordingly, the Commission may delete the names of these dealers and other identifying details before releasing the communications in Item II to the plaintiff.

Item IV

Item IV consists of about sixty reports of interviews conducted by FTC staff attorneys with service station operators and with the official of a service station dealers' association. The reports were written for agency files by the attorneys who conducted the interviews.

The FTC has claimed these documents are exempt from disclosure because they constitute attorney's work product. In *N.L.R.B. v. Sears, Roebuck & Co.*, 42 U.S. 132 (1975), the Supreme Court held that Exemption (5), 5 U.S.C. § 552(b)(5), which protects "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency," embraces the privilege against disclosure of an attorney's work product. *Id.* at 154.

In its earlier decision the court held that the interview reports comprising Item IV were privileged as attorney's work product only if they had been prepared with an eye toward litigation. In its current affidavit, the FTC has satisfactorily established that these documents were indeed litigation-oriented. They are therefore exempt from disclosure.

Item VI B

Item VI B consists of ten documents, all of them notes an FTC attorney took of phone conversations he had with officials of various states agencies whose responsibilities related to the oil and gas industry. The FTC claims that these documents are also exempt under Exemption (5).

Exemption (5) protects not only an attorney's work product but also material that is an integral part of the agency's predecisional deliberative process. *See Vaughn v. Rosen*, 523 F.2d 1136, 1143-47 (D.C. Cir. 1975). The FTC initially suggested that it was basing its claim of exemption on this ground; it argued that disclosure would impair its deliberative process. In the affidavit submitted in response to the court's order, however, the agency does not contend that these documents were integral to the Commission's deliberative process but rather that they constitute attorney's work product.

The Commission has adequately shown that the memoranda were prepared with an eye toward litigation. The memoranda are therefore exempt from disclosure, because they are permeated by material which reveals the attorney's thoughts and impressions concerning litigation strategy. According to the affiant, the attorney who wrote the memoranda, even those portions of the memoranda that are pure-

ly factual reveal his litigation strategy, with the exception of the names, addresses, and phone numbers of the state officials with whom he spoke or to whom he was referred. He states that the memoranda were not verbatim transcripts of the phone conversations but rather consisted of his notations of those items that he considered most important to the preparation of the potential litigation. The selection of what information was worthy of being recorded involved the exercise of his professional judgment.

We agree that an attorney's determination of what facts are worth being recorded in the course of preparing for litigation is entitled to be protected as a phase of his litigation strategy, and therefore his work product. *See Kent Corp. v. N.L.R.B.*, 530 F.2d 612, 624 (5th Cir.), *cert. denied*, 429 U.S. 920 (1976). The documents comprising Item VI B are accordingly exempt, with the exception of the names, addresses, and phone numbers of state officials.

Item VI C

Item VI C consists of thirty-one communications between the FTC and other federal agencies. In its order of February 4, 1977, the court granted the government's motion for summary judgment as to the bulk of these documents. The government has failed to submit any affidavit supporting its claim that the documents remaining in Item VI C are exempt from the disclosure requirements of FOIA. The plaintiff is therefore entitled, on submission, to an order directing the government to disclose those Item VI C documents not specifically declared exempt by the court's earlier order.

Motions disposed of in accordance with this opinion.

Submit order on notice.

EXXON CORPORATION, et al. *v.* FEDERAL TRADE COMMISSION et al.*

No. 77-2473. F.T.C. Docket 8934.

(United States Court of Appeals, Third Circuit, December 7, 1978)

1. VENUE STATUTE DOES NOT REQUIRE THAT EVERY PLAINTIFF IN GOVERNMENT ACTION RESIDE IN FORUM DISTRICT.

   Venue statute does not mandate that every plaintiff in action against federal government or agent thereof independently meet standards of statute; there is no requirement that all plaintiffs reside in forum district.

2. SINCE AT LEAST ONE PLAINTIFF HAD RESIDED IN DELAWARE, SUIT AGAINST GOVERNMENT WAS PROPERLY VENUED IN THAT STATE.

   Venue was proper in Delaware for action against federal government where at least one plaintiff did reside in Delaware.

3. SUBSEQUENT CHANGE IN PARTIES DOES NOT AFFECT VENUE, WHICH IS DETERMINED AT OUTSET OF LITIGATION.

   Venue is determined at outset of litigation and is unaffected by subsequent change in parties.

4. NONRESIDENT PLAINTIFFS WERE NOT DEPRIVED OF PROPER VENUE BY DISMISSAL OF RESIDENT PLAINTIFFS' CLAIMS AT OUTSET OF THE ACTION AND THEIR FAILURE TO APPEAL.

   [896] Dismissal of resident plaintiffs' claims at outset of action against federal government and the failure of resident plaintiffs to appeal did not deprive nonresident plaintiffs of proper venue.

5. IT IS WITHIN DISTRICT COURT'S DISCRETION TO GRANT OR WITHHOLD DECLARATORY JUDGMENT, AND ABSENT AN ABUSE OF THAT DISCRETION, ITS DECISION WILL NOT BE REVERSED.

   Decision to grant or withhold a declaratory judgment is committed to discretion of district court and that discretion will not be reversed in the absence of an abuse of discretion.

6. DECLARATORY JUDGMENT ACT SHOULD BE LIBERALLY INTERPRETED.

   Declaratory Judgment Act should have liberal interpretation.

7. CLOSER SCRUTINY THAN THAT ORDINARILY GIVEN ON AN ABUSE OF DISCRETION REVIEW WOULD BE ACCORDED A DISTRICT COURT DECISION DECLINING JUDISDICTION IN A DECLARATORY JUDGMENT ACTION, BUT APPELLATE COURT WOULD NOT REVERSE MERELY BECAUSE IT WOULD DECIDE DIFFERENTLY.

   Where district court has declined jurisdiction in declaratory judgment action, reviewing court will not reverse merely because it would decide differently but decision to decline jurisdiction will be given closer scrutiny than normally given on an abuse of discretion review.

8. FITNESS OF ISSUES FOR JUDICIAL DECISION AND HARDSHIP TO PARTIES OF REFUSING CONSIDERATION ARE PRIMARY FACTORS TO BE ANALYZED IN DETERMINING WHETHER TO EXERCISE JURISDICTION UNDER DECLARATORY JUDGMENT ACT.

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* Reported in 588 F.2d 895 (1978). Petition for rehearing filed January 5, 1979.

Two primary factors to be analyzed in determining whether to exercise jurisdiction under Declaratory Judgment Act include fitness of issues for judicial decision and hardship to parties of refusing consideration.

9. TO REFUSE TO HEAR APELLANTS' CLAIMS MERELY BECAUSE THEY REFUSED TO ABANDON THEIR ACTION IN ORDER TO INTERVENE IN A SUBSEQUENTLY FILED ENFORCEMENT PROCEEDING WOULD BE IMPROPER.

Court would not refuse to hear oil companies' claims for declaration preventing disclosure of document subpoenaed in Federal Trade Commission proceeding merely because oil companies refused to abandon their action in order to intervene in a subsequently filed enforcement proceeding.

10. JUDICIAL DISCRETION TO GRANT DECLARATORY JUDGMENT SHOULD ONLY BE EXERCISED IN THE PUBLIC INTEREST.

A declaratory judgment should be granted only as a matter of judicial discretion exercised in public interest.

11. THAT PLAINTIFFS' CHOSE TO COMPLY WITH FTC SUBPOENAS WOULD NOT PRECLUDE DISTRICT COURT FROM HEARING THEIR CLAIM FOR RELIEF PROTECTING SUBMITTED DOCUMENTS FROM DISCLOSURE.

Court would not refuse to hear oil companies' claim for relief protecting from disclosure documents they submitted in Federal Trade Commission proceeding merely because oil companies could have but did not refuse to comply with such subpoenas.

12. IN VIEW OF THE FINALITY OF FTC'S PROTECTIVE ORDER, CLAIMS THAT THE ORDER FAILED TO PROVIDE ADEQUATE PROTECTION FOR CONFIDENTIAL DOCUMENTS, AND THAT AGENCY LACKED THE POWER TO ENFORCE SUCH ORDERS THAT WERE FIT FOR JUDICIAL RESOLUTION, BUT CLAIM THAT THE DOCUMENTS WERE NOT OBTAINABLE PURSUANT TO THE FOIA REQUIRED FURTHER FACTUAL DEVELOPMENT.

Claims that the Federal Trade Commission did not have power to provide adequate protection for documents it subpoenaed from oil companies regardless of terms of protective order it issued and that particular protective order Commission issued did not, by its terms, provide adequate protection, when considered in light of finality of protective order, were fit for judicial resolution while claim that such documents could never be turned over to third persons pursuant to Freedom of Information Act was not fit for judicial review in light of need for further factual development.

13. DISTRICT COURT COULD NOT DECLINE TO HEAR THE MERITS OF CLAIMS THAT WERE FIT FOR JUDICIAL RESOLUTION WHERE LACK OF JUDICIAL CONSIDERATION COULD RESULT IN SUBSTANTIAL ECONOMIC INJURY.

Where oil companies' claims that the Federal Trade Commission did not have power to provide adequate protection for companies' confidential documents subpoenaed by Commission and that particular protective order Commission issued did not, by its terms, provide adquate protection were fit for judicial resolution and where severe economic injury would result absent judicial consideration of claims, district court could not decline to hear merits of claims.

14. UNLESS FTC ABUSES ITS DISCRETION IN DETERMINING WHAT PROTECTION WAS NECESSARY TO SAFEGUARD SUBPOENAED CONFIDENTIAL DATA, COURT CANNOT IMPOSE ITS OWN SET OF PROTECTIONS.

It is within discretion of agency to determine what protection must be given confidential information agency receives in course of its investigations; court

cannot impose its own set of protections unless agency abuses its discretion in determining what protection is necessary. [897]

Oil companies brought action seeking injunctive relief and declaratory judgment to the effect that the Federal Trade Commission was not providing and could not provide adequate protection for confidential documents it subpoenaed from oil companies and that those documents were not obtainable pursuant to the Freedom of Information Act. The United States District Court for the District of Delaware, Murray M. Schwatz, J., 436 F.Supp. 1019, dismissed the complaint, and appeal was taken. The Court of Appeals, A. Leon Higginbotham, Jr., Circuit Judge, held that where oil companies' claims that the Commission did not have power to provide adequate protection for subpoenaed documents and that particular protective order issued by Commission did not, by its terms, provide adequate protection were fit for judicial resolution and where severe economic injury would result if there was no judicial consideration of claims, district court should not have declined to hear merits of claims but district court did have right to refuse to exercise jurisdiction to hear claim that documents could never be turned over to third persons pursuant to Freedom of Information Act.

Reversed.

(Syllabus, with substituted captions, taken from 588 F.2d 895)

William Simon, John S. Kingdon, Robert G. Abrams, Stuart H. Harris, Howrey & Simon, Washington, D.C., for appellant, Exxon Corp.

Jesse P. Luton, Jr., John E. Bailey, Houston, Tex., for appellant, Gulf Oil Corp.; *John H. Chiles, Richard P. Ryan, Walter B. Morgan,* Houston, Tex., *Benjamin T. Richards, Jr.,* New York City, of counsel.

Michael N. Sohn, Gen. Counsel, *Gerald P. Norton,* Deputy Gen. Counsel, *W. Dennis Cross,* Asst. Gen. Counsel, *William A. Horne,* Atty., Federal Trade Commission, Washington, D.C., *Kent Walker,* Asst. U.S. Atty., Wilmington, Del., for appellees.

Before ALDISERT and HIGGINBOTHAM, *Circuit Judges,* and MEANOR, *District Judge.**

OPINION

A. LEON HIGGINBOTHAM, JR., *Circuit Judge.*

Exxon Corporation and Gulf Oil Corporation, in response to a subpoena *duces tecum,* have turned over to the Federal Trade Commission a substantial volume of documents many of which are confidential. They then joined with other plaintiffs in the filing of a complaint in the United States District Court for the District of Delaware seeking a declaratory judgment to the effect that the FTC was not providing and could not provide adequate protection for its confidential documents and that those documents are not obtainable pursuant to

* H. Curtis Meanor, United States District Judge for the District of New Jersey, sitting by designation.

the Freedom of Information Act. The district court recognized that it possessed jurisdiction to decide the merits of appellants' claims. The district court decided, however, that it had discretion not to exercise this jurisdiction and dismissed the complaint. *Exxon Corp.* v. *FTC*, 436 F.Supp. 1019 (D.Del.1977). Because we conclude that the district court did not have discretion to decline to hear a portion of appellants' claims we will reverse with respect to certain claims and remand for a decision on the merits of those claims.

I. A HISTORY OF THE PROCEEDINGS

The genesis of this litigation was the filing by the FTC on July 18, 1973 of a complaint (FTC Docket No. 8934) against Exxon Corp., Texaco, Inc., Mobil Oil Corp., Standard Oil Co. of California, Standard Oil Co. (Indiana), Shell Oil Corp. and Atlantic Richfield Co. The FTC alleged that these oil companies have engaged in a variety of anti-competitive practices. On November 24, 1976, a Commission Administrative Law Judge issued substantially identical subpoenas *duces tecum* to the respondent companies. The information sought related to the companies' organizational structure, record keeping systems and refining operations. On December 9, 1976, the respondent companies jointly moved for the entry of a protective order by the ALJ. The companies did not, however, withdraw the contention they had previously made, in seeking to limit the scope of the subpoenas, that the FTC did not have the authority to issue an order that would adequately protect the confidentiality of the subpoenaed documents.

On January 4, 1977, the ALJ, acting under the powers provided in 16 C.F.R. § 3.42(c), issued a protective order covering all the documents subpoenaed. Paragraph 9 of that order provided:

> 9. Notwithstanding any of the foregoing provisions, in the event of a Freedom of Information Act request or an official request from any Congressional committee or subcommittee for disclosure of any document designated "Confidential" hereunder or any information contained therein, authorized representatives of the Commission's Office of General Counsel may inspect the document for purposes of advising the Commission on the request and defending the Commission's interests in court. Furthermore, the Commission shall provide the party which supplied a [898] confidential document with ten (10) days' notice prior to releasing the document in response to such a request or otherwise.

The Commission, on January 31, 1977, approved this paragraph with one modification. In the event of a request for confidential documents through congressional or judicial process, the ten-day notice requirement would not apply. Instead, ten days notice would be given where

possible, and as much notice would be given as is reasonably possible under the circumstances.

On August 1, 1978, the Commission issued an order stating that it was the Commission's intent, in issuing its January 31, 1977 order, to retain the requirement that respondents always be given ten days notice before their documents are turned over to anyone unless in response to congressional or judicial requests. Congressional or judicial requests remain subject to the qualified notice provisions just described.

All respondents to the FTC proceedings other than Texaco and Shell filed the instant suit against the FTC on February 18, 1977, seeking injunctive relief. On March 3, 1977, the plaintiffs, now including Shell, filed an amended complaint seeking declaratory as well as injunctive relief.

On August 19, 1977, the district court granted the FTC's motion to dismiss the complaint without prejudice. A motion for relief from that dismissal was denied on September 30, 1977.

Of the companies to whom subpoenas were issued, only Exxon and Gulf decided to comply. As a result, the FTC commenced an enforcement proceeding against the other companies in the District Court for the District of Columbia on July 27, 1977. That court granted enforcement without modifying the Commission's protective order and rejected claims essentially identical to those made here. *FTC* v. *Anderson,* 442 F.Supp. 1118 (D.D.C.1977).

II. VENUE

At the outset, we must face the FTC's contention, not decided below, that venue was improper in Delaware.

The applicable venue statute, 28 U.S.C. Section 1391(e), provides:

> (e) A civil action in which a defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or an agency of the United States, or the United States, may, except as otherwise provided by law, be brought in any judicial district in which (1) a defendant in the action resides, or (2) the cause of action arose, or (3) any real property involved in the action is situated, or (4) *the plaintiff resides if no real property is involved in the action.* Additional persons may be joined as parties to any such action in accordance with the Federal Rules of Civil Procedure and with such other venue requirements as would be applicable if the United States or one of its officers, employees, or agencies were not a party.
>
> The summons and complaint in such an action shall be served as provided in the Federal Rules of Civil Procedure except that the delivery of the summons and complaint to the officer or agency as required by the rules may be made by certified mail beyond the territorial limits of the district in which the action is brought. [emphasis supplied]

The FTC concedes that one of the original plaintiffs, Standard Oil Co. of California, was properly venued in Delaware because it is a Delaware corporation. A second Delaware corporation, Shell Oil Co., joined in the amended complaint. The FTC argues, however, that 1) one or more properly venued plaintiffs do not provide proper venue for other co-plaintiffs and 2) even if this first contention fails, the early dismissal of the properly venued plaintiffs deprives the other plaintiffs of proper venue. We agree with neither argument.

[1] With respect to the first contention, requiring every plaintiff in an action against the federal government or an agent thereof to independently meet section 1391(e)'s standards would result in an unnecessary multiplicity of litigation. The language of the statute itself mandates no [899] such narrow construction. There is no requirement that all plaintiffs reside in the forum district. *See Kenyatta* v. *Kelley*, 430 F.Supp. 1328, 1330 n.7 (E.D.Pa.1977); *Candarini* v. *Attorney General*, 369 F.Supp. 1132, 1135 (E.D.N.Y.1974).

We are not constrained to reach the opposite conclusion by this court's per curiam affirmance in *Abbott Laboratories* v. *Celebrezze*, 352 F.2d 524 (3d Cir. 1965), *cert. dismissed as to the venue issue*, 387 U.S. 136, 157 n.20, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967). The district court in the case[1] dismissed twenty-six of thirty-seven plaintiff corporations because of improper venue. The district court, however, discussed only the issue of where corporations reside for purposes of 1391(e) and apparently assumed, without discussion, that all plaintiffs must independently meet 1391(e) requirements. The following is the full text of this court's per curiam opinion affirming the district court:

> The named appellants in the above entitled case are some, but not all, of the plaintiffs who joined in the complaint for declaratory judgment and injunctive relief.
>
> We find no prejudicial error in the dismissal of the complaint as to these plaintiffs, and that action will be affirmed.

[2] The Supreme Court in dismissing certiorari with respect to the venue issue noted that this court had not explicitly endorsed the lower court's construction of 1391(e)'s requirements. 387 U.S. 136, 157 n.20, 87 S.Ct. 1507, 18 L.Ed.2d 681. The Court stated that the dismissed plaintiffs were adequately represented by the remaining corporate plaintiffs and especially by the Pharmaceutical Manufacturers Association which was a proper party to the action and of which all the dismissed plaintiffs were members. This court in affirming because of the absence of "prejudicial error" may also have grounded its decision on the adequate protection of the dismissed plaintiffs' interests by the remaining plaintiffs. Thus, we are not

[1] *Abbott Laboratories* v. *Celebrezze*, 228 F.Supp. 855 (D.Del.1964).

bound by *Abbott* to construe 1391(e) as requiring that every plaintiff must independently meet that second test. Instead we hold that venue is proper for this action because at least one plaintiff did reside in Delaware.

[3, 4] The FTC's second contention is that the residence of one or more plaintiffs in Delaware does not make all plaintiffs properly venued because the resident plaintiffs' claims were dismissed at the outset of the action. Actually the claims of all plaintiffs were dismissed by the district court through the order which we review today. That dismissal does not, however, deprive nonresident plaintiffs of their right to appeal the district court judgment. This result does not, as the FTC contends, open the doors to the joinder of plaintiffs with frivolous claims so as to circumvent venue requirements. Where a district court finds that such a ploy has been attempted, it may dismiss the frivolous claims and not permit the other parties to use those claims as a basis for providing themselves with proper venue. The relief sought by the resident plaintiffs here was the same as that sought by the other plaintiffs including Exxon and Gulf. The dismissal of those plaintiffs and their failure to appeal does not deprive Exxon and Gulf of proper venue since venue is determined at the outset of the litigation and is not affected by a subsequent change in parties. *See* 3B *Moore's Federal Practice* ¶ 25.05, p. 25-167 (2d ed. 1978). We hold, therefore, that venue was proper here.

III. THE ISSUES PRESENTED

This is one of those cases in which the greatest difficulties arise in defining the issues rather than in resolving them. The parties' briefs characterize the issues in divergent terms and, even in oral argument, neither counsel seemed ready to accept the definition of the issues as proffered by the panel.

Plaintiffs are seeking three declarations which would provide the basis for other possible relief: [900]

1. That the FTC has no sufficient means to enforce any protective order it issues *regardless of the facial adequacy of the order's provisions.*
2. That the terms of the protective FTC order here, *do not* provide adequate protection for plaintiffs' documents (primarily with respect to its notice provisions) *regardless of the mechanisms by which those terms would be enforced.*[2]

[2] The difference between the first two claims for relief is illustrated by the following examples. If the protective order provided that confidential documents could be turned over to a third party without requiring any notice to appellants' counsel and if the ALJ were somehow given the contempt powers now possessed by district courts, it might be argued that the terms of the protective order were inadequate [claim 2] but the enforcement mechanisms would be clearly adequate [claim 1]. If, however, the order provided that documents could only be turned over after appellants' counsel had given their consent in writing, but a person who violated that order was only subject to a civil penalty of $25, there would be little basis for appellants to challenge the terms of the protective order [claim 2], but the enforcement mechanisms would be clearly inadequate [claim 1]. Ultimately, of course, both claims relate to the adequacy of the protection being afforded appellants' documents, but each claim refers to a different aspect of that protection and, therefore, the two are properly analyzed separately.

3. That the documents produced pursuant to the subpoena cannot be obtained by third parties by means of the procedures provided by the Freedom of Information Act, 5 U.S.C. Section 552.

[5-7] As mentioned, the district court declined to exercise its jurisdiction under the Declaratory Judgment Act to decide any of these claims. The central issue on appeal therefore is whether the district court abused its discretion in declining to exercise jurisdiction over any or all of the claims. Two comments, one obvious and the other less obvious, must be made with respect to this formulation of the issue. The obvious comment is that we are deciding only whether the district court must hear the merits of the claims; we are not deciding the merits ourselves. The second comment concerns the applicable standard of review. It is clearly the law of this court that the decision to grant or withhold a declaratory judgment is committed to the discretion of the district court and that decision will not be reversed in the absence of an abuse of discretion. *See Davis* v. *Romney,* 490 F.2d 1360, 1370 (3d Cir. 1974); *General Motors Corp.* v. *Volpe,* 457 F.2d 922, 923 (3d Cir.1972). It is also the law of this court, however, that the Declaratory Judgment Act should "have a liberal interpretation." *See Simmonds Aerocessories* v. *Elastic Stop Nut Corp.,* 257 F.2d 485, 489 (3d Cir.1958); *Dewey & Almy Chemical Co.* v. *American Anode, Inc.,* 137 F.2d 68, 70 (3d Cir.), *cert. denied* 320 U.S. 761, 64 S.Ct. 70, 88 L.Ed. 454 (1973). Thus, in this context, the ambit of the district court's discretion is somewhat circumscribed and the range of our review is correspondingly enlarged. At the risk of becoming entrapped in a maze formed by multiple articulations of the standard of review, we will attempt one further elucidation of the standard here. Where the district court has declined jurisdiction, we will not reverse merely because we would decide differently, but the decision to decline jurisdiction will be given closer scrutiny than normally given on an "abuse of discretion" review. We recognize that other courts have applied the "mere error" standard of review in this context,[3] but the law of this court is to the contrary.[4]

IV. THE EXERCISE OF JURISDICTION UNDER THE DECLARATORY JUDGMENT ACT

The exercise of this discretion must be reviewed within the framework provided by the Supreme Court in the *Abbott Laboratories* trilogy: *Abbott Laboratories* v. *Gardner,* 387 U.S. 136,

[3] *See, e.g., Beacon Construction Co.* v. *Matco Electric Co.,* 521 F.2d 392, 397 (2d Cir. 1975); *Alsager* v. *District Court of Polk County, Iowa,* 518, F.2d 1160, 1163 (8th Cir. 1975).

[4] *See Davis* v. *Romney, supra; General Motors* v. *Volpe, supra.*

87 S.Ct. 1507, 18 L.Ed.2d 681 (1967) (Abbott I); *Toilet Goods Ass'n* v. [901] *Gardner,* 387 U.S. 158, 87 S.Ct. 1520, 18 L.Ed.2d 697 (1967) (Abbott II); *Gardner* v. *Toilet Goods Ass'n,* 387 U.S. 167, 87 S.Ct. 1526, 18 L.Ed.2d 704 (1967) (Abbott III). These cases involved pre-enforcement challenges to regulations promulgated under the Food, Drug and Cosmetic Act, 21 U.S.C. Section 301 *et seq.,* seeking declaratory and injunctive relief. The Court determined that there was jurisdiction in the federal courts under the Declaratory Judgment Act and the Administrative Procedure Act to decide cases challenging the type of agency action involved there. The Court went on to state:

> A further inquiry must, however, be made. The injunctive and declaratory judgment remedies are discretionary, and courts traditionally have been reluctant to apply them to administrative determinations unless these arise in the context of a controversy "ripe" for judicial resolution. Without undertaking to survey the intracacies of the ripeness doctrine it is fair to say that its basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties. The problem is best seen in a two-fold aspect, requiring us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.

Abbott I, 387 U.S. at 148-49, 87 S.Ct. at 1515 (footnote omitted).

The court below considered the *Abbott* trilogy not to be directly applicable because it considered those cases applicable only to *pre*-enforcement review. The district court stated that the action before it was not a pre-enforcement review because by the time of the opinion (though not when the original or amended complaint was filed), the enforcement action by the FTC had already begun in the District of Columbia District Court. *Exxon Corp.* v. *FTC,* 436 F.Supp. at 1024. The district court did note that the considerations stated in *Abbott* "apply with equal force to the instant matter." *Id.* at 1023. Also, much of the district court's analysis parallels that prescribed in *Abbott.* We conclude that *Abbott's* teachings apply to *extra*-enforcement review rather than merely to *pre*-enforcement review. Thus, the significant question is not when the instant action was filed or acted upon vis-a-vis the enforcement proceeding, but whether declaratory relief should be made available outside the channels normally provided for the challenge of agency action. Appellants also contend that the *Abbott* trilogy is inapposite because those cases dealt with "ripeness." The above quotation from *Abbott* does refer to ripeness, but the ultimate issue addressed is when should a court exercise its discretionary jurisdiction under the Declaratory Judgment Act. Because the Court in *Abbott* I explicitly found that jurisdiction

existed before it proceeded to further analysis,[5] it was clearly not discussing ripeness in the jurisdictional sense or defining justiciability.[6]

Since we conclude that *Abbott's* teachings are applicable here, we will proceed to discuss their application.

[8] As the above quotation from *Abbott* reveals, two primary factors must be analyzed:

1. The fitness of the issues for judicial decision.
2. The hardship to the parties of refusing consideration.

The fitness of the issues for judicial decision is determined by analyzing the subsidiary issues of whether the issues are purely legal or whether they require factual development and whether there has been final agency action. Finality for this purpose is [902] to be given a pragmatic definition. The hardship to the parties is determined by looking to the magnitude and immediacy of the impact likely to result from a denial of judicial consideration.

As discussed above, appellants have made essentially three claims for declaratory relief. Each claim must be considered on its own. As to the hardship which would result from denial of judicial consideration, the harm would be the same with respect to each claim. That hardship is the severe competitive injury that could result from public dissemination of appellants' confidential documents. We cannot say that there is a great likelihood that this competitive injury would occur with any immediacy if appellants' claims are not heard by the district court. But this case is so extraordinary in terms of the breadth of the underlying investigation and the volume of documents to be sought that the magnitude of the possible injury outweighs the lack of immediacy for the purpose of our *Abbott* analysis. Although the exact number of the documents produced is not apparent on this record, the FTC's initial subpoena request was for documents numbering in the tens of millions. Respondents asserted that compliance with a modified request would require the search of hundreds of millions of document pages. *See* Appellants' Brief, pp. 4-5. A further indication of the scope of the action here is that both the appellants' and the FTC's counsel appear to concur in the estimate that FTC action will not be heard by the ALJ until the mid-1980's and the ultimate conclusion of the proceedings will not be reached until well into the 1990's.

We therefore conclude that the extraordinary nature of the discovery here, and the resulting possibility of substantial hardship if judicial consideration at this point is denied, require the exercise of

[5] 387 U.S. at 148, 87 S.Ct. 1507.

[6] Although *Abbott* was referred to in *General Motors Corp.* v. *Volpe*, 457 F.2d 922, 923 as considering ripeness in a "jurisdictional sense," this statement was made in *dictum*.

declaratory jurisdiction if the issues are fit for judicial resolution. We do not intimate that any claim for more confidential treatment of documents will meet this prong of the *Abbott* test. Only the incredible magnitude of the discovery contemplated here has brought us to our conclusion.

[9-11] The FTC contends that the possible hardship just discussed is illusory because Exxon and Gulf could have intervened in the FTC's enforcement proceeding in the District of Columbia or could have refused to comply with the subpoena and thereby become party to the enforcement proceeding or finally could refuse to comply with future subpoenas[7] and litigate the issues at a future enforcement proceeding. With respect to the possibility of intervention in the enforcement proceeding, we note that appellants' action was filed prior to the enforcement action. The enforcement proceeding has already been completed in the district court and is now on appeal to the District of Columbia Circuit. We think it improper to refuse to hear appellants' claims merely because they refused to abandon their action in order to intervene in a subsequently filed action. With respect to the FTC's assertion that appellants could have refused to comply with the subpoena or can refuse to comply with a future subpoena, we deem it unfair to penalize appellants for expeditiously complying with the FTC's request. "A declaratory judgment . . . should be granted only as a matter of judicial discretion, exercised in the public interest." *Eccles* v. *Peoples Bank of Lakewood Village, California*, 333 U.S. 426, 431, 68 S.Ct. 641, 644, 92 L.Ed. 784 (1948). Discouraging compliance with subpoenas by making the availability of relief from inadequate protective orders *always* conditioned on refusal to comply with the subpoena would not serve the public's interest in administrative efficiency and judicial economy. Hence we refuse to alter our conclusion with respect to hardship on the basis that appellants could refuse to comply with past or future subpoenas and thereby litigate their claim in another forum.

[903] [12, 13] Thus we reach the question of whether the issues here are fit for judicial resolution. We must therefore discuss whether the agency action here is final and whether the issues are purely legal or require factual development. The FTC has already reviewed the most crucial provision of the ALJ's protective order and we have no reason to believe that any further revision or review of the protective order is contemplated. Thus the finality requirement is met. The second question is whether the issues are purely legal or whether further factual development is necessary. With respect to appellants' first two claims (that the FTC does not have the power to provide adequate

[7] The FTC issued new subpoenas on January 12, 1978. Motions to quash these subpoenas were denied by the ALJ per his order of September 8, 1978. The ALJ did order certain modifications of those subpoenas.

protection for their documents regardless of the terms of the order and that the particular protective order does not, by its terms, provide adequate protection), the issues seem to be purely legal and any factual development could be easily achieved in the district court. With respect to appellants' claim that their documents could never be turned over to third persons pursuant to the Freedom of Information Act, however, there is a need for further factual development that could not be obtained at this time in the district court. *Who* requests *which* document for *what* purposes may well be relevant to any final determination of this issue. Thus here, as in *Abbott* II, judicial appraisal would be on a "much surer footing in the context of a specific application . . . than could be the case in the framework of the generalized challenge made here." 387 U.S. at 164, 87 S.Ct. at 1524.[8] Thus, appellants' first two claims are both fit for judicial resolution and substantial hardship may result to appellants if there is no judicial consideration. Therefore, the district court did not have discretion to decline to hear the merits of these claims. With respect to the Freedom of Information Act claim, however, the issues are not sufficiently fit for judicial resolution to warrant the exercise of declaratory jurisdiction. Therefore, the district court's refusal to exercise jurisdiction to hear that claim was proper.

V. THE ISSUES ON REMAND

[14] We have already noted that appellants should not be penalized for complying with the subpoena. Neither, however, should they be given an advantage in challenging the protections provided by the FTC. Appellants' claims should be considered under the same test in the district court on remand as they would in an enforcement proceeding. The Supreme Court, in *FCC* v. *Schreiber,* 381 U.S. 279, 85 S.Ct. 1459, 14 L.Ed.2d 383 (1965), has made it abundantly clear that it is within the discretion of an agency to determine what protection must be given the confidential information it receives in the course of its investigations. A court cannot impose its own set of protections unless the agency abused its discretion in determining what protection was necessary. The FTC concluded here that the terms of its protective order provided adequate protection for appellants' documents. It also concluded that the available sanctions, including the criminal penalty imposed by 18 U.S.C. § 1905 on employees of the federal government for disclosure of confidential information are ade-

[8] The Supreme Court held, in *N.L.R.B.* v. *Robbins Tire & Rubber Co.,* 437 U.S. 214, 98 S.Ct. 2311, 57 L.Ed.2d 159 (1978), that witnesses' statements in pending unfair labor practice proceedings are exempt under the Freedom of Information Act and that such determination need not be made on a case-by-case basis. Since the category of requests involved there was much narrower than that here, that decision does not affect our conclusion that case-by-case determination of Freedom of Information Act claims is necessary here.

quate to enforce that protective order. The district court on remand must determine whether the FTC abused its discretion in reaching those conclusions.[9] Otherwise, under *Schreiber,* there would be no basis for judicial intervention.

[904] In affirming the dismissal of the Freedom of Information Act claim, we do not prevent the district court from considering whether the FTC's protective order provides for adequate notice to appellants prior to the turning over of their documents pursuant to a Freedom of Information Act request. This question relates to the adequacy of the FTC order and therefore will be properly before the district court on remand.

VI. CONCLUSION

For the foregoing reasons, the judgment of the district court will be affirmed insofar as it dismissed the Freedom of Information Act claim and will be reversed insofar as it dismissed the claims pertaining to the adequacy of the terms of the FTC's protective order and the adequacy of the FTC's enforcement mechanisms. We will remand for the district court to decide these last two issues in accordance with the discussion set forth in this opinion. We, of course, do not intend to limit the district court's discretionary power to transfer or consolidate the remanded portion of this action with the enforcement action commenced by the FTC in the District of Columbia[10] if such transfer or consolidation appears desirable and feasible. *See* 28 U.S.C. § 1404(a).[11]

[9] The District of Columbia District Court has already ruled that there has been no such abuse of discretion. *FTC* v. *Anderson, supra.* Appellants here, of course, were not parties to that action and are therefore not bound by the ruling there.

[10] *FTC* v. *Anderson, supra.*

[11] After this opinion was drafted, counsel for the FTC forwarded to the court copies of the opinions in the following cases: *Exxon Corp.* v. *FTC,* No. 77-1302, 589 F.2d 582 (1978) and *Reuben H. Donnelley* v. *FTC,* 580 F.2d 264 (7th Cir. 1978). Counsel for Exxon forwarded to the court a copy of the opinion in the case, *Wearly* v. *FTC,* 462 F.Supp. 589 No. 77-1860 (D.N.J. October 18, 1978). After careful consideration of these rulings, we adhere to our decision.

ASSOCIATION OF NATIONAL ADVERTISERS, INC.
v.
FEDERAL TRADE COMMISSION et al.*

Civ. A. No. 75-0896. F.T.C. File No. 99-238.

(United States District Court, District of Columbia, December 21, 1978)

In an FOIA proceeding seeking documents concerning the FTC proposed Trade Regulation Rule on Food Advertising, court held that rulemaking is a deliberative process and documents reflecting that process were exempt from FOIA disclosure, as were related exchanges of information between the Commission, its staff and outside experts, and drafts of the proposed rule. However, court referred the matter to Magistrate Margolis for a study to determine whether withheld data had been sufficiently described in the Commission index and whether they were reflective of the deliberative process.

Before OBERDORFER, *District Judge.*

MEMORANDUM AND ORDER

In this case, plaintiff seeks several hundred documents from the Federal Trade Commission pursuant to the Freedom of Information Act, 5 U.S.C. 552(a). The documents sought relate to a Trade Regulation Rule on food advertising, which the defendants have been considering since 1974 but have not yet promulgated in final form.†

On August 27, 1976, Chief Judge William B. Jones denied cross motions for summary judgment but ordered defendants to resubmit an index of documents, describing accurately and separately, in detailed, non-conclusory terms, each document withheld from plaintiff, which index should:

(1) Identify the documents and portions of documents claimed to be exempt from disclosure, pursuant to 5 U.S.C. §552(b)5, providing, with regard to each such document:

(a) detailed, non-conclusory evidentiary material about each withheld document;

(b) identification of any evidentiary privilege claimed; and

(c) the reasons why the privilege is applicable to the document.

(2) Identify, with particularity, which documents or portions defendant caused to be exempt from disclosure by 5 U.S.C. § 552(b)(7)(A) and, with regard to each claim, provide to the Court and to the plain-

*Not otherwise reported.

†A proposed rule was published in the *Federal Register* on November 11, 1974 (39 Fed. Reg. 39842 (1974)).

tiff specific factual and evidentiary material supporting the claims that:

(a) the documents were compiled for law enforcement purposes; and

(b) disclosure would interfere with law enforcement proceedings, identifying and describing the law enforcement proceeding which would suffer interference and explaining the effect of disclosure on defendants' ability to act in those proceedings.

On September 27 and 28, 1976, defendants filed a Memorandum and a Supplemental Memorandum, supported by appendices, in response to the Court's Order, which defendants claimed furnished the information required by the Court's August 27 Order. These appendices were supplemented, in turn, by detailed affidavits executed by Richard B. Huyag, an Assistant Auditor for the Division of National Advertising of the FTC Bureau of Consumer Protection, and Miriam Bender, Esquire, a staff attorney. These affidavits related in some detail the "consultative and deliberative process" which has been underway at the FTC since 1973 with respect to the proposed regulation on food advertising. The affidavits relate several harmful effects on the FTC's decision-making process and intra-staff consultation which would result from disclosure of the withheld documents, and spell out attorney work product and personnel privacy claims for withholding a large number of the documents in question. The affidavits also waived the 7(a) exemption claim which had been previously asserted by defendants.

After these filings, in response to the Court's August, 1976, Order and before plaintiff could comment on the defendants' submissions, defendants appealed the order and then, sometime later, voluntarily withdrew the appeal. Thereafter, on January 26, 1978, this Court approved plaintiff's suggestion, acquiesced in by defendants, that further proceedings be stayed pending the Court of Appeals decision in *Bristol-Myers Company v. FTC* (No. 77-1275, argued January 4, 1978, decided August 22, 1978). On May 31, 1978, the defendant objected to further stay and the Court vacated it. Since then the parties have renewed their cross-motions for summary judgment, and each has had a full opportunity to file oppositions to the motions of the other party.

The cross filings raise issues of principle—primarily whether the pending rule-making is a deliberative process within the meaning of exemption 5—and infinte issues of detail.

The Court is satisfied that FTC rule-making is a deliberative process. Furthermore, although this rule-making has been pending since at least 1973, it is still in progress. There is no evidence that it is

being protracted in order to protect documents, or for any other ulterior purpose. Accordingly, the Court concludes that all documents which would otherwise be entitled to exemption as reflecting the deliberative process, which should culminate in a final regulation, have not lost that exemption because of any interim decisions reached by defendants or because the final regulation has been in process for a substantial period.‡

The conclusion that the FTC is still engaged in a deliberative process with respect to the final rule-making, leaves for decision the more detailed issues which are here raised.

1. *Staff Role*

Plaintiff argues that even if the deliberative process continues, many staff documents are not entitled to exemption because the staff is an interested person in the proceedings, and has filed with the defendants and made public a statement of law and policy and its proposal about the pending regulations. Plaintiff cites no authority for this contention, and defendants persuasively argue that the publication of some of the staff submission with respect to the proposed rule-making does not require that all the other material considered by the staff internally or shared by the staff with the defendants during their deliberative process thereby loses its exemption.

The staff presumably prepared the published document with the care one would prepare a document for publication. Documents not intended for publication (as evidenced by the fact that they were not published) have been protected by Congress to encourage frank written communication without the dotting of every "i" and the crossing of every "t", thereby facilitating franker advice and freer deliberation. Accordingly, the Court concludes that the stance of the staff *vis-a-vis* the defendants in this proceeding does not vitiate any exemption to which unpublished documents would otherwise be entitled.

2. *Experts*

Plaintiffs claim that exchanges of information between the defendants, the staff and outside experts consulted on the pending matter dissolved the exemption, with respect to documents involved in those exchanges. This Court has recently held that the advice of an outside expert about litigating strategy is exempt as attorney work product.

‡*NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 151 (1975); compare *Vaughn II*, 523 F.2d 1136, 1146. If the final rule-making should become protracted to the point where it is apparent that no final action is likely, plaintiffs could, of course, renew their claim on this issue.

Exxon v. FTC, No. 78-0530, November 17, 1978. *See Bristol-Myers Company v. FTC*, No. 77-1275, slip op. at 19 (D.C. Cir. August 22, 1978). Defendants here contend, without serious contradiction, that all of the expert opinion documents withheld reflect the opinions of the experts concerning the fundamental policy decisions the Commission would have to make with respect to the regulation. Analogizing rule-making to decision-making, these expert opinions are entitled to the same exemption from disclosure as would be enjoyed with respect to expert opinions received by the staff with respect to litigation tactics and strategy. The disclosure of such documents would have a chilling effect on the activities of experts and the deliberative process. Accordingly, the Court holds that to the extent the withheld documents contain expert recommendations to defendants regarding policy, as distinguished from observations of facts which do not intrude in the deliberative process, the documents are exempt. *See Washington Research Project, Inc. v. Department of Health, Education and Welfare*, 504 F.2d 238 (D.C. Cir.), *cert. den.*, 421 U.S. 963 (1974); *Soucie v. David*, 448 F.2d 1067 (D.C. Cir. 1971).

3. *Drafts*

The plaintiffs seek copies of drafts of proposed regulations published in 1974. Drafts are obviously reflective of deliberation and the exemption claim will be sustained. The fact that some drafts were disclosed does not require disclosure of others.

Having decided these large and small issues of principle, there remain for consideration the plaintiff's intricate contentions that several hundred particular documents should nevertheless be disclosed because they were not, in fact, reflective of the deliberative process, contained expert opinions about facts, as distinguished from policy, or were not described in the Appendices to the extent or in the manner required by Judge Jones' Order of August 26, 1976. In order expeditiously to resolve these detailed contentions, the Court will refer them to Magistrate Lawrence Margolis for a prompt study and a report in which he will identify any document claimed by plaintiff to be subject to disclosure, which is found by the magistrate:

(1) To be (or to contain information) subject to disclosure because it is neither a part of nor reflective of the deliberative process, or

(2) To be insufficiently described in defendants' index to comply with the court's August 26, 1976 Order.

It is so ORDERED.

CHOCOLATE MANUFACTURERS ASSOCIATION v. FEDERAL TRADE COMMISSION*

Civ. A. No. 78-1240. F.T.C. File No. 99-409.

KELLOGG COMPANY v. FEDERAL TRADE COMMISSION et al.*

Civ. A. No. 78-1879. F.T.C. File No. 99-409.

(United States District Court, District of Columbia, December 22, 1978)

In a consolidated FOIA action seeking disclosure of documents generated in connection with FTC's childrens' advertising rulemaking proceeding, court ordered release of 15 of the remaining 100 disputed documents, consisting for the most part of drafts and notes for speeches and articles which were not part of the Commission's deliberative process, and a Commission circulation concerning the proposed Guide on Television Advertising of Premiums to Children that had been incorporated by reference into the decision not to issue the Guide. The court sustained FTC claim of exemption for the remaining 85 documents, which consisted of internal staff memoranda.

Before GESELL, *District Judge.*

MEMORANDUM

After considering the briefs, affidavits and arguments of counsel and completing a careful *in camera* inspection of the remaining documents still under dispute in this Freedom of Information Act suit, the Court has concluded that the Commission's claims for exemption under 5 U.S.C. § 552(b)(5) should be sustained as to certain documents and denied as to others in the respects indicated below.

Consultants. Documents numbered 17, 18, 27, 41, 72, 73 and 74 are agency papers relating to the formulation of policy, the status of the writers or recipients as consultants or FTC employees having been satisfactorily established by affidavit. These documents are therefore exempt.

Commission Minutes. The Court has reconsidered its ruling as to certain memoranda referred to in the Commission's "blue minutes" in the light of an additional affidavit from the Commission's Secretary suggesting such reconsideration. It appears to the Court that on reconsideration exemption should be sustained as to documents numbered 5, 8 and 65 for the reason that the Commission

*Not otherwise reported.

did not adopt those memoranda, but that the exemption still cannot be sustained as to document No. 93. The ambiguity with respect to the nature and effect of the Commission's "blue minutes" should be corrected to avoid this unnecessary problem and uncertainty in the future.

Drafts of Speeches and Articles. This category comprises drafts of speeches or articles to be delivered or written either by a member of the Commission or its staff. Some of the speeches or articles were in fact never actually given and the material was not used. It does not appear to the Court that any of these speeches or articles form a "direct part" of the formulation of Commission "policy." *See Jordan v. United States Department of Justice,* No. 77-1240, slip op. at 39-45 (D.C. Cir. Oct. 31, 1978). The papers indicate that the speeches or articles were merely intended to express the personal opinions of their authors. None of them announced new FTC policy. Speeches and articles are not in and of themselves agency "policies." Accordingly, the exemption will not be sustained as to documents numbered 30, 45, 46, 75, 77 and 78, and these documents shall be released.

Miscellaneous. Upon inspection the following documents appear to be wholly unrelated to the formulation of policy and indeed quite inconsequential: documents numbered 15, 19, 26 and 86 shall be released. Other documents fall squarely within the deliberative policy exemption and are of a type which the exemption was designed to protect in order to preserve free discussion within the agency and accordingly the following documents are declared exempt: 4, 10, 13, 18, 21, 22, 24, 31, 37, 53 and 89.

The Court wishes to commend the Commission for the conscientious manner in which it has proceeded in dealing with these sweeping requests.

The Court having determined whether or not the exemption is to be sustained as to each of the documents submitted *in camera*, the proceedings are closed.

SO ORDERED.

CIVIL PENALTY CASES

RESPONDENTS—F.T.C. ORDERS

United States v. STP Corporation—United States District Court for the Southern District of New York; consent decree in the amount of $500,000 for civil penalties, $200,000 for corrective advertising, and an injunction was entered February 9, 1978, for alleged violations of a consent order prohibiting certain practices in the advertising of automotive engine products. (Docket C-2777, 87 F.T.C. 56).

United States v. Merck and Company, Inc.—United States District Court for the District of Columbia; consent decree in the amount of $100,000 for civil penalties was entered June 2, 1978, for alleged violations of an order involving certain deceptive practices in the advertising of throat lozenges. (Docket 8635, 60 F.T.C. 526).

United States v. Four States Builders and Remodelers, Inc.—United States District Court for the District of New Jersey; consent decree in the amount of $10,000 for civil penalties, and an injunction was entered July 19, 1978, for alleged violations of a consent order involving certain practices in the selling of home improvements. (Docket C-2218, 80 F.T.C. 784).

United States v. Bridgestone Tire Company of America, Inc.—United States District Court for the Central District of California; consent decree in the amount of $100,000 for civil penalties, a requirement that defendant must advertise performance tests verified by independent experts, and an injunction was entered September 7, 1978, for alleged violations of a consent order involving certain practices in the advertising of automobile tires. (Docket C-2734, 86 F.T.C. 825).

United States v. Maxwell Auslander—United States District Court for the District of Maryland; consent decree in the amount of $50,000 for civil penalties, $60,000 for refunds to customers, and an injunction was entered September 25, 1978, for alleged violations of an order involving certain unfair and deceptive practices in the selling of furniture. (Docket 8911, 83 F.T.C. 1542).

United States v. Maylis Textile Corporation, Morris Ellis, Sidney Landau, and *Milton Steiger*—United States District Court for the Southern District of New York; consent decree in the amount of $41,000 for civil penalties, a requirement that defendants have all wool products they import tested for fiber quality, and an injunction was entered November 13, 1978, for alleged violations of a consent order involving certain practices prohibited by the Wool Products Labeling Act of 1939. (Docket C-1551, 76 F.T.C. 5).

NON-RESPONDENTS—F.T.C. ORDERS

United States v. Seligman and Associates, Inc., and *Mid-States Mortgage Corporation*—United States District Court for the Eastern District of Michigan; consent decree in the amount of $15,000 for civil penalties and an injunction was entered April 10, 1978, for allegedly engaging in practices previously determined to be unfair and deceptive in F.T.C. proceedings against *Charnita, Inc.* (Docket 8829, 80 F.T.C. 892); *Southern States Distributing Company, Inc.* (Docket 8882, 83 F.T.C. 1126); *Seekonk Freezer Meats, Inc.* (Docket 8880, 82 F.T.C. 1025); *Beauty Style Modernizers, Inc.* (Docket 8898, 83 F.T.C. 1761); and *Reliable Mortgage Corporation* (Docket 8956, 85 F.T.C. 21).

United States v. Hasbro Industries, Inc.—United States District Court for the District of Rhode Island; consent decree in the amount of $40,000 for civil penalties and an injunction was entered June 16, 1978, for allegedly engaging in practices previously determined to be unfair and deceptive in an F.T.C. proceeding against *Ideal Toy Corporation* involving toy advertising. (Docket 8530, 64 F.T.C. 297).

TRADE REGULATION RULES

United States v. Verlan Industries, Inc., a subsidiary of Cox Broadcasting Corporation—United States District Court for the Eastern District of New York; consent decree in the amount of $25,000 for civil penalties, a requirement that defendant make a corrective mailing to its customers, and an injunction was entered April 18, 1978, for alleged violations of F.T.C. Trade Regulation Rule Pertaining to the Use of Negative Option Plans by Sellers in Commerce. (16 CFR § 425)

United States v. Westinghouse Security Systems, Inc.—United States District Court for the Western District of Pennsylvania; consent decree in the amount of $10,000 for civil penalties was entered June 15, 1978, for alleged violations of the F.T.C. Trade Regulation Rule Concerning a Cooling-Off Period for Door-to-Door Sales. (16 CFR § 429).

United States v. Book-of-the-Month Club, Inc.—United States District Court for the Southern District of New York; consent decree in the amount of $85,000 for civil penalties and a requirement that defendant release certain customers from minimum purchase agreements was entered September 5, 1978, for alleged violations of the F.T.C. Trade Regulation Rule Pertaining to the Use of Negative Option Plans by Sellers in Commerce. (16 CFR § 425).

United States v. Wayne Lasater d/b/a American Bridal Con-

sultants—United States District Court for the Western District of Oklahoma; consent decree in the amount of $3,000 for civil penalties, a requirement that defendant offer former customers a right to cancel their contracts, and an injunction was entered September 18, 1978, for alleged violations of the F.T.C. Trade Regulation Rule Concerning a Cooling-Off Period for Door-to-Door Sales. (16 CFR § 429).

United States v. The City Sewing Machine Company, Inc.—United States District Court for the District of Kansas; consent decree in the amount of $15,000 for civil penalties and an injunction was entered September 25, 1978, for alleged violations of the F.T.C. Trade Regulation Rule Concerning Undelivered Mail Order Merchandise and Services. (16 CFR § 435).

United States v. Panacolor, Inc., American Consumer, Inc. and *Canyon House, Inc.*—United States District Court for the District of Columbia; consent decree in the amount of $40,000 for civil penalties and an injunction was entered October 27, 1978, for alleged violations of the F.T.C. Trade Regulation Rule Pertaining to the Use of Negative Option Plans by Sellers in Commerce. (16 CFR § 425).

United States v. Federated Department Stores, Inc.—United States District Court for the Southern District of Ohio, Western Division; consent decree in the amount of $50,000 for civil penalties, a requirement that defendant invite rejected applicants for credit to re-apply, an explication of how rejected applications for credit are to be explained to the applicants, and an injunction was entered November 16, 1978, for alleged violations of the Equal Credit Opportunity Act and its implementing Regulation B. (12 CFR § 202).

SPECIAL REPORTS

United States v. Disco Oil Company—United States District Court for the Northern District of Illinois, Eastern Division; consent judgment in the amount of $3,500 for failure to file a special report in connection with the Quarterly Financial Reporting Program, and a requirement that defendant file such report within twenty-five days after receipt of a request to do so, was entered February 21, 1978.

United States v. Pharmaceutical Research Association—United States District Court for the District of Connecticut; consent judgment in the amount of $2,000 for failure to file a special report in connection with the Quarterly Financial Reporting Program, and a requirement that defendant file such report within time period specified in the request was entered February 21, 1978.

United States v. Dobbs, Inc.—United States District Court for the Eastern District of Michigan, Southern Division; consent judgment

entitling plaintiff to the amount of $15,500 should defendant fail to complete and timely submit any special report it may subsequently be required to file in connection with the Federal Trade Commission's Quarterly Financial Reporting Program was entered February 6, 1978.

United States v. Ascot Oils, Inc.—United States District Court for the Northern District of Texas; consent judgment in the amount of $3,000 for failure to timely file a special report in connection with the Quarterly Financial Reporting Program, and a requirement that defendant file such report within twenty-five days after receipt of a request to do so was entered March 23, 1978.

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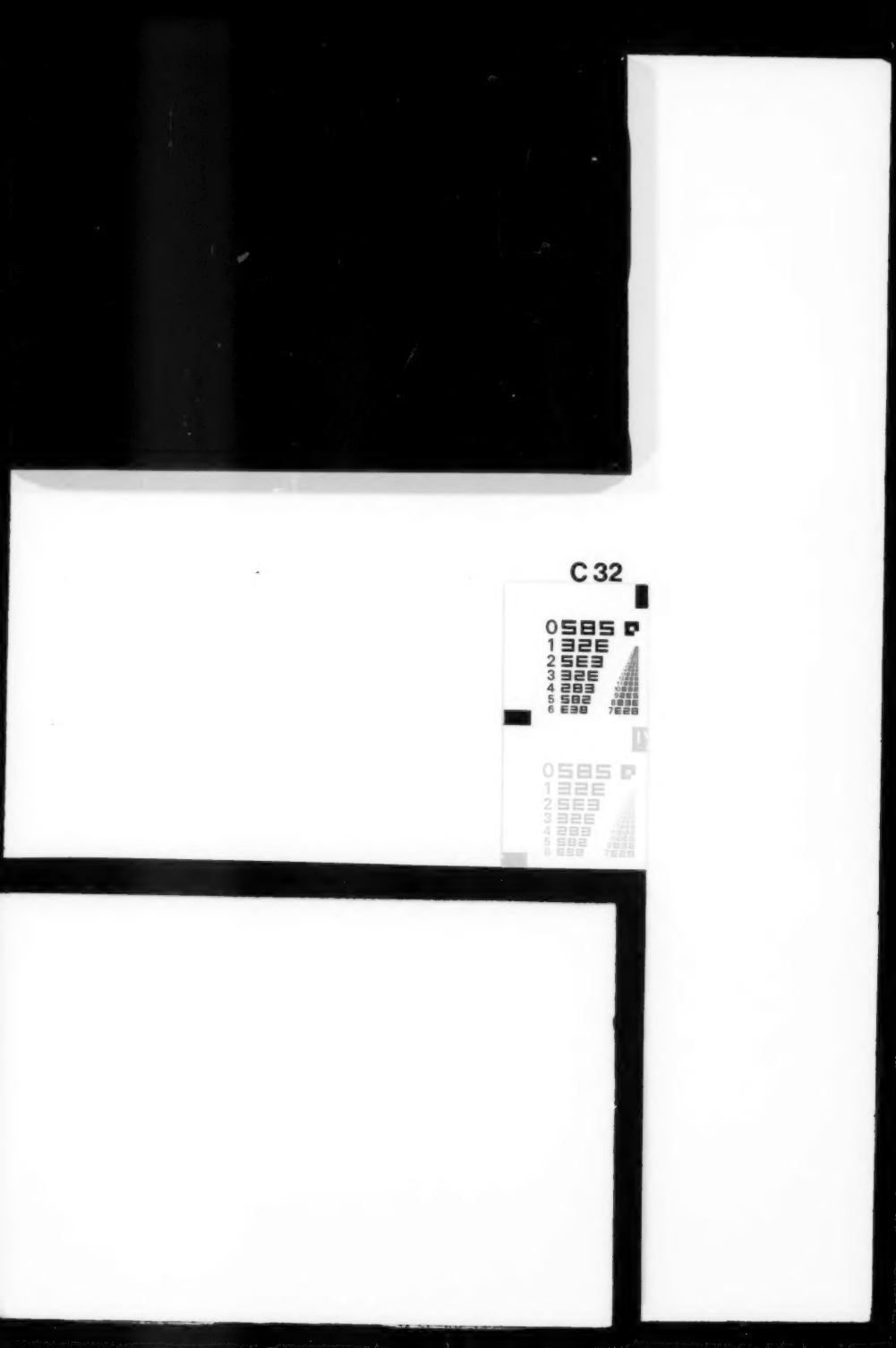
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